No. 255

IN THE

Supreme Court of the United States

October Term, 1948

GERHART EISLER, *Petitioner,*

v.

THE UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER

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WILSON - EPES PRINTING CO. - RE 6003 - WASHINGTON 1, D. C.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia is reported in 170 F. (2d) 273. The opinion of the trial court has not been reported.

JURISDICTION

The jurisdiction of this Court rests upon 28 U. S. Code sec. 1254. The petition for a writ of certiorari was granted on November 8, 1948 (R. 253).

STATUTES INVOLVED

The following statutes are set out in the Appendix to this brief:

(a) Rev. Stats. sec. 102, as amended by Act of June 22, 1938, 2 U. S. C. sec. 192.

(b) Act of March 3, 1911, c. 231, sec. 21, formerly section 21 of Judicial Code.

(c) Sec. 121(b), Legislative Reorganization Act of 1946.

(d) Geneva Convention on Prisoners of War, Article 5.

STATEMENT OF THE CASE

This case presents for review a judgment affirming the conviction of the petitioner for violation of Rev. Stats. sec. 102, as amended, 2 U. S. C. sec. 192, quoted in Appendix.

Gerhart Eisler, the petitioner herein, is an Austrian national (R. 117), a member of the German Communist movement (R. 222), who came to the United States in June, 1941 as a political refugee en route to Mexico under a transit visa (R. 113, 114). At the trial, the court excluded evidence proffered to prove that Eisler was detained in this country against his will by the government's cancellation of his transit visa and its refusal to grant his numerous requests for permission to leave the country (R. 95-98, 115 118, 62, 63, and see R. 219, 220).

On January 24, 1947, the House Committee on Un-American Activities served a subpoena requiring Eisler to appear before the Committee in Washington on February 6, 1947 (R. 13, 22, 23). Thereafter, Eisler prepared for his forthcoming appearance by conferring with counsel, preparing a statement, buying railroad tickets to Washington for himself and his wife, and making Washington hotel reservations (R. 122, 110, 111).

On February 4, 1947, two days before his scheduled appearance, Eisler was arrested in New York as an "enemy alien" by two security officers of the Immigration and Naturalization Service of the Department of Justice (R. 80, 81, 82, 123). Eisler was taken by the arresting officers to Ellis Island (R. 124), and on the next day (February 5) was taken, still in the custody of the Immigration officers, to Washington, D. C. There he was confined in the District jail overnight (R. 83, 125). On February 6, 1947, he was taken in the same custody, to the hearing room of the Committee on Un-American Activities (R. 13, 30, 85). During the hearing he was still in custody (R. 81).

At the trial, the court excluded evidence proffered to prove that Eisler's arrest was illegal, in that (a) Eisler was, as the Department of Justice knew, an Austrian national and hence not an enemy alien, (b) the arresting officers neither had nor exhibited a warrant of arrest, and (c) the government had earlier discontinued the arrest and internment of enemy aliens (R. 80, 82, 87-92, 97, 98, 102, 108, 109, 124, 63-66.) The court also excluded evidence offered to prove that this illegal arrest was instigated by the Un-American Activities Committee of the House of Representatives for the purpose of having him brought before the Committee and to punish him for his political beliefs and to prevent his departure from the United States and his return to Germany (R. 68-71, 79, 80, 88-90, 100-102, 104, 105, 119-120, 213).

At the hearing before the Commitee, the following occurred (read into the record from a transcript of the hearing (R. 43-47):

> The Chairman.[1] Now, Mr. Stripling, call your first witness.
>
> Mr. Stripling: Mr. Gerhart Eisler, take the stand.
>
> Mr. Eisler: I am not going to take the stand.

[1] The Chairman of the hearing was Representative J. Parnell Thomas (R. 13, 14). Mr. Stripling was the Committee's Chief Investigator (R. 26). Mr. Mundt and Mr. Rankin were members of the Committee.

Mr. Stripling: Do you have counsel with you?

Mr. Eisler: Yes.

Mr. Stripling: I suggest that the witness be permitted counsel.

The Chairman: Mr. Eisler, will you raise your right hand?

Mr. Eisler: No. Before I take the oath——

Mr. Stripling: Mr. Chairman——

Mr. Eisler: I have the floor now.

Mr. Stripling: I think, Mr. Chairman, you should make your preliminary remarks at this time, before Mr. Eisler makes any statement.

The Chairman: Sit down, Mr. Eisler.

Now, Mr. Eisler, you will be sworn in. Raise your right hand.

Mr. Eisler: No.

The Chairman: Mr. Eisler, in the first place, you want to remember that you are a guest of this Nation.

Mr. Eisler: I am not treated as a guest.

The Chairman: This committee——

Mr. Eisler: I am a political prisoner in the United States.

The Chairman: Just a minute. Will you please be sworn in?

Mr. Eisler: You will not swear me in before you hear a few remarks.

The Chairman: No; there will be no remarks.

Mr. Eisler: Then there will be no hearing with me.

The Chairman: You refuse to be sworn in? Do you refuse to be sworn in, Mr. Eisler?

Mr. Eisler: I am ready to answer all questions, to tell my side.

The Chairman: That is not the question. Do you refuse to be sworn in? All right.

Mr. Eisler: I am ready to answer all questions.

The Chairman: Mr. Stripling, call the next witness. The committee will come to order, please. What is the pleasure of the commitee?

Mr. Stripling: Mr. Chairman, I think that the witness should be silent, or take the stand or be removed from the room, one or the other, until this matter is determined.

Mr. Mundt: Mr. Chairman, suppose you ask him again whether he refuses to be sworn.

Mr. Rankin: Not 'sworn in' but to be sworn.

The Chairman: Mr. Eisler, do you refuse, again, to be sworn?

Mr. Eisler: I have never refused to be sworn in. I came here as a political prisoner. I want to make a few remarks, only 3 minutes, before I be sworn in, and answer your questions, and make my statement. It is 3 minutes.

The Chairman: I said that I would permit you to make your statement when the committee was through asking questions. After the committee is through asking questions, and your remarks are pertinent to the investigation, why, it will be agreeable to the committee. But first you have to be sworn.

Mr. Eisler: That is where you are mistaken. I have to do nothing. A political prisoner has to do nothing.

The Chairman: Then you refuse to be sworn?

Mr. Eisler: I do not refuse to be sworn. I want only 3 minutes. Three minutes to make a statement.

The Chairman: We will give you those 3 minutes when you are sworn.

Mr. Eisler: I want to speak before I am sworn.

Thus, it is clear that, although the petitioner wished to make a three-minute statement before being sworn, he was ready and willing to be sworn and to testify.

The Committee then voted to cite Eisler for contempt (R. 52, 53).

On February 27, 1947, an indictment was filed charging that Eisler failed and refused to be sworn to testify before the Committee, "and thereby on February 6, 1947, within the District of Columbia, willfully did make default" (R. 214, 215). Eisler was arraigned before Chief Justice Laws on April 22 (R. 215, 230). Immediately prior to the arraignment, Carol King, of the New York bar, was admitted by Chief Justice Laws to the bar of the Court *pro hac vice*, and entered her appearance as counsel of record for the petitioner (R. 229, 230).

On May 23, 1947, the motion to dismiss the indictment was argued before and denied by Justice Holtzoff (R. 4,

221). On May 29, Eisler filed an affidavit alleging bias and prejudice on the part of Justice Holtzoff (R. 222-226). The affidavit was accompanied by a certificate of Carol King, counsel of record, that it was made in good faith and not for hindrance or delay (R. 226). The affidavit recited, in substance, that Justice Holtzoff had, while legal adviser to the FBI, participated in FBI investigations of aliens and Communists, including an investigation of Eisler, who is an alien Communist, and also that Justice Holtzoff had a personal hatred of Communists, as shown by his sponsoring of anti-Communist legislation and his friendship with and admiration of J. Edgar Hoover, who has used highly intemperate language regarding Communists.

The affidavit further stated that the affiant and his counsel had first learned on May 20, 1947 that Justice Holtzoff was to try the case; that on the same day the petitioner asked his New York counsel if he was obliged to go to trial before Justice Holtzoff in view of the Justice's previous connections with the FBI; that New York counsel arranged to discuss on May 23 in Washington, D. C. with Washington counsel the possibility of filing such an affidavit, but that because of the sudden death of the chief trial counsel's brother on May 23, the conference had to be postponed till May 27. The affidavit was executed in New York City on May 28, 1947 (R. 225) and filed in the District Court for the District of Columbia on May 29, 1947 (R. 222).

The trial began on June 4, 1947 (R. 3, 231) before Justice Holtzoff, who on that day struck the affidavit of prejudice and refused to disqualify himself. (R. 3-6). Thereafter, Justice Holtzoff presided throughout the trial, gave sentence, and signed the judgment (R. 232).

Conduct of the trial court, assigned as error as depriving the petitioner of a fair trial, is described in part V of the argument herein, since it is not readily susceptible to condensed statement.

The jury returned a verdict of guilty (R. 3). Motions for new trial and for arrest of judgment were argued and denied on June 27, 1947 (R. 182-208, 229, 232), and on the same date the court imposed the maximum sentence — one year's imprisonment and a fine of $1,000 (R. 3, 212, 232).

On June 14, 1948, the Court of Appeals for the District of Columbia affirmed the judgment below, with Justice Prettyman dissenting (R. 233-246). A petition for rehearing was denied on July 17, 1948 (R. 247-252).

SPECIFICATION OF ERRORS TO BE URGED

1. The court below erred in affirming the judgment of the trial court because

(a) the authority of the House Commitee on Un-American Activities to compel testimony under the sanction of punishment for contempt, on its face and as applied generally and in the present case, is unconstitutional as in contravention of the First, Fourth, Fifth, Ninth and Tenth Amendments; and

(b) the statute establishing the House Committee on Un-American Activities, on its face and as construed and applied by the Committee, is unconstitutional as in contravention of the First, Fourth, Fifth, Ninth and Tenth Amendments.

2. The court below erred in affirming the judgment of the trial court because

(a) the prosecution had failed to introduce any evidence to show that the petitioner had been summoned on a matter of inquiry committed to the Committee by Congress or in aid of a legislative function, and conviction in the absence of such evidence denied petitioner's constitutional rights under the Fifth, Ninth and Tenth Amendments; and

(b) the petitioner had not been permitted to introduce evidence to show that the Committee, in summoning him,

was acting beyond its authority, in order to punish him, and not in aid of a legislative function; these exclusions were erroneous, and the conviction also thereby denied the petitioner's constitutional rights under the First, Fifth, Ninth and Tenth Amendments.

3. The court below erred in affirming the judgment of the trial court because the petitioner could not, under the Fifth, Ninth and Tenth Amendments, be validly punished for contempt of the Committee in view of his having been illegally arrested at the Committee's instance and brought before it in custody, and because petitioner was entitled to make a legal objection to his treatment prior to being required to testify, and because his insistence on making such an objection did not violate the statute.

4. The court below erred in affirming the judgment of the trial court because of the failure of the trial judge to disqualify himself upon the filing of the affidavit of bias and prejudice.

5. The court below erred in affirming the judgment of the trial court because petitioner had been denied his constitutional rights to a fair trial under the Fifth Amendment and because the court's charge to the jury in essence directed a verdict of guilty contrary to the Sixth Amendment.

6. The court below erred in affirming the judgment of the trial court because of the erroneous nature of the charge to the jury that "willfully" as used in the statute required only that the appellant had acted intentionally and deliberately, as contrasted with accidentally and inadvertently.

7. The court below erred in affirming the judgment of the trial court because petitioner was not required to testify before the Committee in that

(a) he was an alien in transit detained in this country by governmental authorities against his will; and

(b) he was, at the time he appeared before the Committee, interned as an enemy alien.

ARGUMENT

I. The Committee on Un-American Activities Is Unconstitutional.

A. The constitutional issue is properly before the Court and should be decided.

No person can validly be punished for withholding from a Congressional committee testimony which Congress may not exact within constitutional limitations. Judicial review is available as to whether the entire subject-matter of an investigation or particular demands made in its course are beyond the jurisdiction of the legislature. *Kilbourn v. Thompson*, 103 U. S. 168; *McGrain v. Daugherty*, 273 U. S. 135, 177-179; *Re Chapman*, 166 U. S. 661; *Sinclair v. United States*, 279 U. S. 263; *Jurney v. MacCracken*, 294 U. S. 125; *Re Pacific R. Commission*, 12 Sawy. 559, 32 Fed. 241. And this is true when section 102 of the Revised Statutes is being applied (*Sinclair v. United States, supra; Re Chapman, supra*), as well as when a House of Congress is imposing legislative punishment (*Jurney v. MacCracken, supra*) or is merely enforcing its process. *McGrain v. Daugherty, supra.* Indeed, were the case otherwise, there would be no substance to Justice Brandeis' assertion that "the ground for such fears [of abuse of the contempt power] has since been effectively removed by the decisions of this Court which hold that assertions of congressional privilege are subject to judicial review." *Jurney v. MacCracken, supra*, at 150.

The authority granted to the Committee on Un-American Activities of the House of Representatives is, we assert and shall demonstrate, in excess of the powers of Congress and an infringement of the liberties of the people. Enforcement of the Committee's process and punishment

for default of its process would violate the bill of rights. For these reasons, the conviction of the petitioner cannot be sustained and the indictment must be dismissed.

It is appropriate that the reversal of the conviction be grounded on this basic constitutional defect rather than on the numerous other errors which exist and which we brief. Disposal of the constitutional issue now will serve the administration of justice in view of the pendency of numerous other cases involving the same subject, and simple justice to a persecuted individual calls for eliminating a retrial if proper grounds exist. Even more important, "Legislation restraining speech, which is excepted from the principle that constitutionality is presumed, should for similar reasons be excepted from the related principle that no ruling on constitutionality is made when a case can be decided on other grounds." Edgerton, J., dissenting in *Barsky v. United States*, 167 F. (2d) 241, 263.

The government has suggested in its opposition to the petition for certiorari that the petitioner cannot raise the issue as to the validity of the Committee's authority because he was not in fact interrogated by the Committee. This suggestion is wholly irrational. The petitioner was convicted of default of the Committee's summons, i. e., of non-appearance as a witness in response to a subpoena, not of refusing to answer questions. There is no sense in a theory that a person may not challenge a demand (to appear) which he resisted, and for which resistance he has been convicted, because an additional demand (to answer a question) was not also made and resisted. The assertion of the power to compel testimony must be sufficiently mature to be tested whenever it is sufficiently mature to support prosecution for resistance. Beyond this, the extent to which the power was asserted affects not the right to test but rather what is being tested. Thus one indicted for refusing to answer a question may dispute not only the Committee's right to compel his appearance but also its right to ask the particular question.

In brief, petitioner challenges the right of the Committee to summon him and the right of the government to punish him for default of the summons. Since these rights have been asserted against him to his damage, he has standing to challenge them.

Obviously, the most direct means of placing in issue the validity of a summons is to refuse to honor it. And it has always been true that one who has so refused may object to the validity of the summons whether in proceedings brought to enforce it (*cf. Jurney v. MacCracken*, 294 U. S. 125; *Jones v. SEC*, 298 U. S. 1; *Ellis v. ICC*, 237 U. S. 434; *FTC v. American Tobacco Co.*, 264 U. S. 298; *Hickman v. Taylor*, 329 U. S. 495) or in proceedings seeking to vacate it. *Cf. McGrain v. Daugherty*, *supra*.

B. The nature of the Committee's authority.

1. *The lack of limitations on its authorization to investigate propaganda.*

The Committee on Un-American Activities is authorized by statute to investigate "un-American propaganda activities" and "subversive and un-American propaganda" that "attacks the principle of the form of government as guaranteed by our Constitution." For the purpose of its investigations it may require the attendance and testimony of witnesses and the production of documents. Legislative Reorganization Act of 1946, sec. 121(b), 60 Stat. 828.

The standards contained in this authorization ("un-American," "subversive," and "attacking the principle of the form of government as guaranteed by our Constitution") have no meaning which is even approximately definite by usage, dictionary definition, judicial construction, or administrative interpretations of the Committee. Instead, the key words of the standards are commonly used as epithets of opprobrium for whatever political, social, or moral ideas are distasteful to the person applying the description. *Constitutional Limitations on the Un-American Activities Committee*, 47 Col. L. Rev. 416 (hereinafter

cited as "Note, 47 Col. L. Rev."). "Any political idea that happens to conflict with the economic or political notions of an individual is apt by him to be deemed un-American." *Feinglass v. Reinecke,* 48 F. Supp. 438, 441. Hence the Committee's authority in confined only by the subjective desires and prejudices of its members.

The Committee's authority runs only to the investigation of "propaganda," a word that refers to a dissemination of ideas. "Un-American" propaganda must therefore refer to ideas which are foreign or antagonistic to "American" ideas or beliefs. But it is impossible to develop either a legal or philosophical concept that certain ideas are "American" while others are not. It is unreal to ascribe a geographical location to ideas current in the modern world, and an attempt to do so is particularly fatuous when applied to a country which was settled by persons from other lands and whose culture includes diverse and conflicting strains of political, social and economic thought of foreign inspiration. *Cf.* Parrington, *Main Currents of American Thought* (1927), *passim.* America is a great melting pot of ideas and cultures, as well as of nationalities. Which are we to call "American" and which "un-American"? The ideas of Hamilton or the ideas of Jefferson? Of Franklin D. Roosevelt (which many have labelled as "un-American") or of Alfred Landon? Or the Tories or of Tom Paine? Of Robert Ingersoll or of Mary Baker Eddy? Of Senator Taft or of Eugene Dennis? Of Woodrow Wilson or of Henry Cabot Lodge? And by what system of semantics are ideas "un-American" if they are traceable to the foreigner Karl Marx, while they are "American" if traceable to such other foreigners as Mill, Bacon, Kant, Montesquieu, Paul, and Plato?

Because the Committee's charter lists its standards for investigation in the alternative, the unlimited character of the term "un-American" leaves the Committee's authority unrestricted even if meaning can be found for the word

"subversive" and the phrase "the principle of the form of government as guaranteed by our Constitution." It happens, however, that these standards too are without content.

The word "subversive" refers to the "overturning" of something. The statute, however, supplies no predicate, and hence no guide is furnished as to what is being overturned. By itself, the word is a meaningless term of abuse usually applied to activities "helpful or benevolent to wage earners, persons on relief, or those who are disadvantaged in the struggle for existence." See Emerson and Helfield, *Loyalty among Government Employees*, 58 Yale L. J. 1, 39, 40 (quoting Attorney General — now Mr. Justice — Jackson). The reference may be to propaganda design to overturn "American" ideas, which leaves the prior dilemma unsolved.

"The principle of the form of government as guaranteed by our Constitution" is no less vague. This Court was unable to isolate the "principles of the Constitution" in *Schneiderman v. United States*, 320 U. S. 118. In *United States v. Schwimmer*, 279 U. S. 644, the Court considered a "lack of nationalistic sense" (at 653) to be opposed to the principles of the Constitution. But this view (which might subject to the Committee's scrutiny literature of, say, organizations favoring Union Now) was reversed in *Girouard v. United States*, 328 U. S. 61, after having been repudiated in the *Schneiderman* case, which refused to hold "that petitioner is not attached to the Constitution by reason of his possible belief in the creation of some form of world union of soviet republics" (at 145). The Court suggested in the *Schneiderman* case that if any principle of the Constitution is essential it is the guaranty of freedom of thought (at 138, 144),[2] and stated (at 137, 138) that the Constitution itself refutes "the idea that attachment to any particular provision or provisions is essential, or that one who advocates radical changes is necessarily not attached to the Constitution."

[2] To the same effect: Justice Holmes, dissenting, in *United States v. Schwimmer*, 279 U. S. 644, 654, 655; Chief Justice Hughes, dissenting, in *United States v. Macintosh*, 283 U. S. 605, 635.

It can be argued perhaps that the principles of the Constitution consist of certain libertarian concepts of the kind offered by Chief Justice Stone, dissenting, in the *Schneiderman* case (see at 181). Or perhaps one may urge the definition of the District of Columbia Court of Appeals: "The basic concept of the American system, both historically and philosophically, is that government is an instrumentality created by the people, who alone are the original possessors of rights and who alone have the power to create government. . . . The prime function of government, in the American concept, is to preserve and protect the rights of the people." *Barsky v. United States*, 167 F. (2d) 241, 245, 246.

But these formulations, no matter how aptly expressed, are so general that their application to virtually every field of dissenting utterance depends on the economic or moral beliefs of the persons who apply them. Thus Justices Stone and Prettyman applied them, in the cases cited, simply so as to fuse the principles of the Constitution with the maintenance of a capitalist economy against Marxist conceptions. Their assumption, in short, was that the Constitution enacts capitalism, and in this they were as erroneous as an earlier court which assumed that the Fourteenth Amendment enacts Mr. Herbert Spencer's Social Statics. *Cf.* Holmes, J., dissenting in *Lochner v. New York*, 198 U. S. 45, 75; Frankfurter, J., concurring in *AFL v. Northwestern Iron & Steel Co.*, ... U. S. ....., Jan. 3, 1949. "But a Constitution is not intended to embody a particular economic theory" (Holmes, J., *loc. cit.*), and it is hard to believe that the Constitution gives legislatures or courts carte blanche to embody in its terms their economic or moral beliefs (*cf.* Holmes, J., dissenting in *Baldwin v. Missouri*, 281 U. S. 586, 595) or "to treat as unconstitutional what goes against the grain." Frankfurter, J., *loc. cit.* To Justice Holmes, at least, it was clear that the Constitution itself protected the advocacy of proletarian dictatorship: *Gitlow v. New York*, 268 U. S.

652, 673 (dissent). And to the sophisticated it must seem strange that espousal of a doctrine adhered to by millions of persons is incompatible with a Constitution whose most essential doctrine is freedom of thought. (*Cf* Thomas Mann: "I testify, moreover, that to my mind the ignorant and superstitious persecution of the believers in a political and economic doctrine which is, after all, the creation of great minds and great thinkers — I testify that this persecution is not only degrading for the persecutors themselves but also very harmful to the cultural reputation of this country. . . . Spiritual intolerance, political inquisitions, and declining legal security, and all this in the name of an alleged 'state of emergency' . . . that is how it started in Germany." Foreword to Kahn, *Hollywood on Trial* (1948), v.).

The obscurity of the statutory phraseology is compounded by the assumption that there is some one principle of the Constitution. Justice Edgerton, dissenting in the *Barsky* case, *supra*, at 262, has shown the difficulty of the expression:

> Does 'the principle of the form of government' here mean the republican or democratic principle only, or does it include e. g. the constitutional duty of courts not to enforce unconstitutional legislation? This court puts a plural where Congress put a singular, and says 'the principles . . . are obvious.' To me it is not obvious how much Congress meant by 'the principle,' or how much the court means, by 'the principles', or that the two meanings are identical. Both because 'the principle' is vague and because 'attacks' is vague, I do not know whether propaganda 'attacks the principle' if, e. g., it advocates a constitutional amendment replacing the American principle of judicial review by the British principle of legislative supremacy.

Nor can it be assumed that advocacy of political change by non-peaceful means (*cf. Barsky v. United States*, 167 F. (2d) 241, 246) is contrary to a Constitutional principle. Such an assumption is irrelevant since, as will more fully appear, neither the authority of the Committee nor the Committee's application of its authority is directed to in-

vestigation of advocacy of violence. In any event, the assumption is an anachronism which is inconsistent with the scope intended for the First Amendment. *Cf. Musser v. Utah*, 333 U. S. 95, 102 (Rutledge, J., dissenting). The Constitution itself protected the right of William Lloyd Garrison to call it a "covenant with death and an agreement with hell" and to burn a copy of it at a public meeting. Lincoln only echoed the second paragraph of the Declaration of Independence when he declared, in his inaugural address, that whenever the people "shall grow weary of the existing government, they can exercise their constitutional right of amending it, or their revolutionary right to dismember or overthrow it."

In the political field our tradition is one of turbulence, disagreement, and even rebellion. As one of our most eminent historians has recently written (Henry Steele Commager, *Who Is Loyal to America?*, Harper's Magazine, Sept. 1947, 193, 196):

> True loyalty may require, in fact, what appears to the naive to be disloyalty. It may require hostility to certain provisions of the Constitution itself, and historians have not concluded that those who subscribed to the 'Higher Law' were lacking in patriotism. We should not forget that our tradition is one of protest and revolt, and it is stultifying to celebrate the rebels of the past—Jefferson and Paine, Emerson and Thoreau—while we silence the rebels of the present.
>
> 'We are a rebellious nation,' said Theodore Parker, known in his day as the Great American Preacher, and went on: 'Our whole history is treason; our blood was attainted before we were born; our creeds are infidelity to the mother church; our constitution, treason to our fatherland. What of that? Though all the governors in the world bid us commit treason against man, and set the example, let us never submit.'

If, therefore, anything is genuinely "un-American" or contrary to the "principles" of our Constitution, it is an attempt by a governmental body to compel conformity. "If there is any fixed star in our constitutional constella-

tion, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein". *W. Va. Board of Education v. Barnette,* 319 U. S. 624, 642.

Where statutory terms are obscure, it is customary to seek clarification in the legislative debates and in administrative construction and practice. The debates on the reenwal of the Committee's authority, since its origin in 1938 as a select committee,[3] fail to supply any content to the terms of its authorization. On the contrary, they indicate the legislature's full awareness of the lack of meaning of the terms. "Indeed, the purpose seems to have been to give the Committee a roving commission to inquire into any propaganda activities which a majority of the Commitee thought warranted investigation." Note, 47 Col. L. Rev., at 422.

At no time in the course of the debates did the proponents of the Committee indicate the meaning of its authority although they were persistently challenged to do so. Thus Representative Johnson said: "What I would like to find out is what is un-American. I cannot seem to get anybody on the committee to give us a definition of that." 81 Cong. Rec. 3286 (1937). Representative Outland expressed similar difficulty:

> Just what are subversive activities? Who is to be the judge? There have been people who have called the chairman of the committee subversive, which in my opinion is entirely incorrect. But the permitting of individual interpretation of just what is deemed sub-

[3] The Committee was created in 1938, was renewed each year till 1945, was made a standing committee in that year, and was retained as a standing committee by the Legislative Reorganization Act of 1946. Note, 47 Col. L. Rev., at 417, citing the legislative authorities in footnotes 8, 9 and 10. The authority granted to the temporary Committees was the same as that granted to the standing Committee. Accordingly, no distinction is here made as between the several temporary Committees and the standing Committee, in discussing the meaning of the authorization, including its administretive interpretations.

versive is a dangerous and un-American thing. [89 Cong. Rec. 806 (1943).]

On July 18, 1946, the chief counsel of the Committee wrote Representative Doyle: "The Committee has adopted no definition of subversive or un-American activities." 92 Cong. Rec. A4743 (1946). Mr. Doyle commented:

> Ever since I became a member of this Seventy-ninth Congress, I have sought to ascertain by what definition of 'subversive activity' or 'un-American activity' a person was to be measured as either a loyal or disloyal American citizen. No one seemed to find any high court citation used by the House Committee nor could I find any printed or any announced definition which the Committee had to either guide or limit its activities.
>
> * * * *
>
> This illustrates that there can be at present as many definitions of 'subversive and un-American' as there are committee members. In fact, I think I notice that there is sharp difference of opinion expressed by committee members on this point [*Ibid.*]

The Committee's own construction of its authority should be particularly informative, because the Congressional reenactments of the Committee's powers constitute legislative acceptance of the Committee's views and practices. The Committee has, however, never defined what propaganda is "un-American" or "subversive" or "attacks the principle of the form of government as guaranteed by our Constitution." On the contrary, the Committee considers its writ to run to all propaganda. Thus Representative Wood, when chairman of the Committee, stated at one of its hearings that "the committee is empowered to investigate any activities of any organization or any individual. The committee conceives it to be within its scope to investigate the activities of any organization that expounds American [*sic*] principles of government." *Hearings on Communist Party*, Committee on Un-American Activities, H. Res. 5, 79th Cong., 1st Sess., Sept. 27, 1945, p. 31. And the Committee's investigations have covered such a wide range of

subjects as to show that it has in fact recognized no restrictions. It has taken "as its field the whole gamut of American political, social and economic life" in an "almost unlimited variety" of investigations. Note, 47 Col. L. Rev., at 418.

Although it has not defined the terms "un-American" and "subversive," the Committee's reports amply demonstrate that the expressions fit whatever views its members dislike. Thus "criteria which the Committee or its agents have from time to time suggested as indicative of activity within the scope of its inquiries are: opposition to 'the American system of checks and balances,' opposition to the protection of property rights, belief in dictatorship, opposition to the Franco government of Spain, opposition to General MacArthur, advocacy of a world state, advocacy of the dissolution of the British Empire, criticism of members of Congress, and criticism of the Committee on Un-American Activities." *Id.*, at 422, 423, giving supporting citations.

We are thus left with this conclusion: the legislative description of the Committee's authority has no meaning in usage, legislative history, judicial construction or administrative practice from which either the Committee or the courts may derive a standard which can be applied in law. The Committee, therefore, is free to investigate whatever expressions it pleases, with no limits whatsoever.

2. *The Committee's role as a censor.*

A direction that a committee investigate whatever it pleases can hardly be instigated by a desire to obtain facts through investigation. The key to an understanding of the Committee on Un-American Activities is the circumstance that it is not, and is not intended to be, an investigative agent of the legislature in the sense that it is meant to obtain and report information for legislative guidance. Instead, its function, which has been adopted

by legislative re-enactment of the Committee, is to be a political censor of opinion and expression, and its inquiry powers exist only so that it may discharge this function.

This function is inherent in, and inevitable to, the grant of jurisdiction to investigate "un-American" and "subversive" propaganda (i.e., to investigate the propagation of "un-American" and "subversive" ideas.) To exercise this jurisdiction, the Committee must necessarily determine which ideas are "un-American" or "subversive." It thus imposes censorship of expression, since most people are unwilling or afraid to advocate, or even to listen to, ideas which the government has stigmatized as being disloyal. Censorship is effectuated directly when offending expression is suppressed. It is effectuated indirectly, but no less effectively, when sanctions are imposed on those who express or listen to offending sentiments. By classifying ideas as "un-American" and "subversive," the Committee imposes on their advocates and audiences the sanction of public odium and obloquy, with all its attendant social, political and economic consequences.

The Committee's censorship is aggravated by the fact that its censorship code is, as we have seen, so undefined as to represent only the subjective prejudices of the Committee's members. Another aggravating characteristic is that those who violate the code are not tried and then turned over to the official jailer, but instead are delivered, without trial, to the hazards of popular retribution. These are at once random, unpredictable and often extremely severe. A person "exposed" by the Committee may find his economic and professional career destroyed, his social and family relationships broken, and his reputation smeared beyond redemption. He may be subjected to mob violence and to discriminatory prosecutions and deportation proceedings. In short, the Committee turns its victims over to lynch law, and, as in more orthodox lynchings, the result is not only injury to the one lynched but a brutalizing and demoralizing effect on those who do the lynching.

Official sources, as well as studies of the Committee's operations,* demonstrate that the function of the Committee is to censor expression by "exposing" persons to the consequences of "public sentiment" (*i. e.*, to lynch law). We can in this brief refer to only a small portion of the mass of material.

(a) Statement of Congressman Dies, first chairman of Committee, on floor of House when Committee was first created.

> . . . I am not in a position to say whether we can legislate effectively in reference to this matter, but I do know that exposure in a democracy of subversive activities is the most effective weapon that we have in our possession. Always we must keep in mind that in any legislative attempt to prevent un-American activities, we might jeopardize fundamental rights far more important than the objective we seek, but when these activities are exposed, when the light of day is brought to bear upon them, we can trust public sentiment in this country to do the rest. 83 Cong. Rec. 7579 (1938).

(b) 1939 Committee report.

> While Congress does not have the power to deny citizens the right to believe in, teach, or advocate communism, fascism, and nazism, it does have the right to focus the spotlight of publicity upon their activities. [H. R. Rep. No. 2, 76th Cong., 1st Sess. 13 (1939).]

(c). 1940 Commitee report.

> One method which can and should from time to time be used is the method of investigation to inform the American people of the activities of any such ["subversive"] organizations. This is the real purpose of the House Committee to Investigate un-American Activities. [H. R. Rep., No. 1476, 76th Cong., 3d Sess., 1, 2.]
>
> The purpose of this committee is the task of protecting our constitutional democracy by turning the light

Cf. Ogden, The Dies Committee (2d ed. 1945); Note, 47 Col. L. Rev., *supra*; 14 U. of Chi. L. Rev. 256; 46 Mich. L. Rev. 521.

of pitiless publicity on the activities of organizations seeking to work the will of foreign dictators in the United States or to destroy our constitutional democracy and set up a totalitarian regime . . . . [*Id.* p. 24.]

(d) 1941 Committee report.

It is the way of exposure—a way which conforms to the letter and spirit of democracy, and is at the same time more effective than a Gestapo. [H. R. Rep. No. 1, 77th Congress, 1st Sess., 23, 24 (1941).]

This committee is the only agency of Government that has the power of exposure. No other agency can require witnesses to appear before it and testify under oath with respect to un-American activities and subversive propaganda. No other agency of Government has the power to subpoena records and documents of un-American organizations, and individuals, except under unusual circumstances. There are many phases of un-American activities that cannot be reached by legislation or administrative action. [Id., p. 24.]

(e) In 1943, the Committee, reporting that discovery and exposure were its "special function" by mandate from the House (H. R. Rep. No. 2748, 77th Cong., 2d Sess. 2 (1943)), published the names, positions and salaries of 563 government employees as members of the American League for Peace and Democracy. "The committee felt that the Congress and the people were entitled to know who they were." *Id.* pp. 4-5.

(f) 1947 Committee report.

The Federal Bureau of Investigation is able to detect and apprehend criminal acts of un-Americanism; the House Committee on Un-American Activities is empowered to explore and expose activities by un-American individuals and organizations which, while sometimes being legal, are nonetheless inimical to our American concepts and our American future. [H. R. Rep. No. 2742, 79th Cong., 2d Sess., 16 (1947).]

(g) Statement of Representative Thomas.

Mr. J. Parnell Thomas, Chairman of the Committee, recently said in a radio address:

The chief function of the committee, however, has always been the exposure of un-American activities. This is based upon the conviction that the American public will not tolerate efforts to subvert or destroy the American system of government, once such efforts have been pointed out. The Congress' right to investigate and expose undemocratic forces is as established and untrammeled as our Constitution. [93 Cong. Rec., A4277 (1947).]

(h) Statements of Representative Rankin.

Mr. Rankin, a leading member of the Committee, said in 1945:

"I serve notice on the Un-American elements in this country now that this 'grand jury' will be in session to investigate un-American activities at all times. [91 Cong. Rec., 275 (1945).]

Mr. Rankin has said, in the present record, that the Commitee is a 'grand jury' to which 'defense counsel' should not be admitted. [Justice Edgerton in *Barsky's* case, *supra,* at 256, footnote 19.]

(i) *Statement of Representative Mundt.*

Our task—to which you members of this House assigned us—is to seek out and to expose those activities which although legal are nonetheless un-American, subversive, and contrary to the American concept.

* * * *

May I interpolate here, Mr. Speaker, to remind the House that in voting favorably as it did on the contempt citations which our committee has brought before you that you stand foursquare with that great constitutional lawyer, Mr. [John W.] Davis, who recommends that the spotlight of publicity be turned on organizations accused of subversive activities. [92 Cong. Rec. 5217 (1946).].

(j) *Statement of Representatives Mundt and Nixon.*

If this committee is not to operate entirely in secret, it cannot avoid making headlines unless it avoids activities in fulfillment of its mandate from Congress to help disclose and curb un-American activities. ["Mundt-Nixon Proposals" (for reform of Committee proce-

dure) of Dec. 27, 1948, in *N. Y. Herald Tribune*, Dec. 28, 1948, p. 19.]

It would be a mistake to infer from the foregoing that the Committee merely "exposes" and subjects to "pitiless publicity" "un-American" views and expressions, after which it allows "public sentiment" to take its course. The Committee is not content to abide by the automatic processes of the public sentiment in which it ostensibly places such great faith. Instead, it stimulates that sentiment to an application of economic lynch law by setting up a vast machinery for blacklisting purposes and by urging (more appropriately, "demanding") the discharge of individuals whose views it dislikes.

The Committee has openly stated that one of its purposes is to eliminate from public and private employment and from trade-union offices those whom it considers "subversive." 9 *Hearings before Special Committee to Investigate Un-American Activities on H. R. 282*, p. 5447 (1939); see Note p. 418. This Court has recognized the Committee's responsibility for legislation unconstitutionally blacklisting for federal employment named persons. *United States v. Lovett*, 328 U. S. 303, 308. The Committee has compiled a blacklist, carefully cross-indexed, of the names of one million "subversive" persons and over 1,000 "subversive" organizations. H. R. Rep. No. 2748, 77th Cong., 2d Sess., 2, 3, (1943); H. R. Rep. 2742, 79th Cong., 2d Sess., 16 (1947); 89 Cong. Rec. 797 (1943) (remarks of Rep. Thomas). From this list it supplies names of "subversive" persons to their public and private employers, and its files are available to intelligence agencies. H. R. 2742, *loc cit.*; see remarks of Congressman Dies, 87 Cong. Rec. 897 (1941). The Committee has officially attributed its success in building up these huge files to its subpoena powers. H. R. Rep. 2748, 77th Cong., 2d Sess., 2, 3 (1943):

One of the accomplishments of the Committee's Hollywood hearings was the discharge from employment of ten

prominent employees of the movie industry and their blacklisting by the studios. See Kahn, *Hollywood on Trial*, 184 (1948). This result the Committee openly demanded from executives of an industry notoriously concerned with public opinion, as appears throughout the questioning of the producers who testified. *Hearings Regarding the Communist Infiltration of the Motion Picture Industry*, Committee on Un-American Activities, 80th Cong., 1st Sess. (1947). Thus Representative Vail repeatedly prodded producer Jack Warner with the suggestion that the Motion Picture Producers Association should set up a blacklist for "the elimination of the writers and the actors to whom definite communistic leanings can be traced." *Id.* at 52, 53. He later explained that the Committee had "the problem of eliminating the Communist element from not only the Hollywood scene but also other scenes in America, and we have to have the full support and cooperation of the executives from each of those divisions." *Id.* at 66. Chairman Thomas persistently demanded that the industry should "set about immediately to clean its own house" of the harmful presence of "known Communists" and "not wait for public opinion to force it to do so." *Id.* at 522, 393. Committee investigator Stripling proposed that "the most effective way of removing these Communist influences—and I say Communist influences: I am not saying Communists; I am not accusing them all of being Communists"—is to "cut these people off the pay roll." *Id.* at 49, 50.

Linked with this approach toward censorship of the movies was the drive of the Committee throughout the Hollywood hearings to coerce the industry to make movies of a kind which would conform to views of the Committee. The method used was on the one hand to attack, or to provide a sympathetic forum for witnesses to attack certain movies as being "pro-Communist" (see, *e. g.*, *id.* at 83-90, 93, 138, 166, 231-234), and, on the other, to urge that the producers make more "anti-Communist" pictures (see,

e. g., at 28, 29, 76, 144, 145, 170, 212, 226, 227). Thus the picture "None But the Lonely Heart" was "exposed" as containing Communist propaganda because it "is moody and somber throughout, in the Russian manner" and the son in the story tells his mother, who runs a second-hand store, "You are not going to get me to work here and squeeze pennies out of little people poorer than I am" (*id.* at 232, 234). And illustrative of the second phase of this effort is the following colloquy:

> THE CHAIRMAN. Well, has the industry the will to make anti-Communist pictures?
>
> MR. McGUINNESS. I think the industry is acquiring it.
>
> * * * *
>
> THE CHAIRMAN. Mr. McGuinness, will these public hearings aid the industry in giving it the will to make these pictures?
>
> MR. McGUINNESS. It is my opinion that they will. [*Id.* at 145.]

An important part of the Committee's censorship system is to distort before "exposing," so that its "exposures" consist largely of publicizing smearing conclusions based on gossip, hearsay, and the process of ascribing guilt by association. The Committee's customary practice in this regard is to conclude, from such "evidence," that any person or organization under its scrutiny who does not share its views is a Communist or Communist sympathizer, and thereupon to "expose" him or it as such.

> Under the guise of attacking Communism he [Mr. Dies] was able to attack all so-called liberal ideas in the field of politics and economics. This was done by pinning the label of Communism on all persons who belonged to any society or organization in which there ever had been any Communist member, or any idea, theory, or action of which any Communist had ever approved. [Cushman, *Civil Liberty and Public Opin-*

ion, in *Safeguarding Civil Liberty Today; Edward L. Bernays Lectures of 1944 given at Cornell University* (1945), 100, 101.]

The marshalling of proof of the Committee's practice of censoring by smearing is impeded by an *embarass de richesses*, there being hardly a Committee report which does not demonstrate the technic. The utter irresponsibility of one such report, H. R. Rep. No. 592, 80th Cong., 1st Sess. (1947), dealing with the Southern Conference for Human Welfare, has been convincingly demonstrated in Gellhorn, *Report on a Report of the House Committee on Un-American Activities*, 60 Harv. L. Rev. 1193. Professor Robert E. Cushman observed that I and Professor Carl L. Becker had been placed on the Committee's "subversive" list because they had been among thousands of signers of a petition to President Roosevelt to recognize the Soviet Union (an action which, of course, Mr. Roosevelt subsequently took). Cushman, *loc. cit.* In one of its reports the Committee graphically illustrated that it applies the doctrine of guilt by association by a system of cross fertilization. It published a chart which lists vertically the names of fifty individuals (including Melvyn Douglas, Lewis Gannett, Frank P. Graham, Stanley Isaacs, Gardner Jackson, Frank Kingdon, Freda Kirchway, Ludwig Lore, and Reinhold Neibuhr) and horizontally the names of twenty-five organizations or activities (the latter including the acts of contributing to certain periodicals, having works published by certain publishers, and signing an open letter for closer cooperation with the Soviet Union). Within the boxes formed by the intersecting vertical and horizontal lines placed a check to show with what organizations and activities each of the individuals listed was identified. From this chart, presumably, one is to conclude that the persons named are subversive by virtue of their affiliation with the organizations, and the organizations are subversive because of the persons who are affiliated with them. H. R. Rep. No. 2277, 77th

Cong., 2d Sess., 9-22 (1942). Elsewhere it made the following logical deduction:

> Inasmuch as we are in receipt of reliable information that Mexico City is now the center of Communist activities in the western hemisphere, the figure would lead one to believe that it is entirely possible that a considerable portion of the $250,000.00 referred to [money sent by Joint Anti-Fascist Refugee Committee for refugees in Mexico City] was used for purposes other than medical aid and relief. [H. R. Rep. No. 2233, 79th Cong., 2d Sess. 37 (1946).]

Recently, the Committee has spent considerable time investigating espionage. See, e. g., *Hearings Regarding Communist Espionage in the United States Government*, 80th Cong., 2d Sess. 501-1379 (1948). An investigation of undercover espionage is obviously far removed from a genuine investigation of propaganda, and therefore not by any stretch within the Committee's jurisdiction. It does, however, represent fundamental spade-work in the Committee's system of censorship. As we have seen, it is a favorite device of the Committee to "expose" people by linking them with Communism. The success of this tactic depends on the existence of a public dislike for Communism, and it is therefore appropriate for the Committee to stimulate this dislike. Additional reasons for the investigation, of course, were the opportunities it afforded for attacks on the executive branch of the Government, for urging legislation restricting speech and assembly, and for bolstering a waning prestige. *Cf.* interim Committee report, *id.* at 1354, 1356, 1357; communication of Prof. Zachariah Chafee, Jr. in *Washington Post*, Dec. 13, 1948, p. 9. The Committee, of course, conducted its espionage inquiry, with great publicity, since otherwise its propaganda purpose would have failed. As a result, President Truman was impelled to declare that its investigation violated the Bill of Rights (Washington Evening Star, Aug. 19, 1948, p. 1), while the Attorney General condemned it as "an

attempted encroachment upon the independent integrity of a coordinate branch of government" and as "contrary to our democratic system." *Department of Justice Release*, Sept. 29, 1948.

Also illustrative of the Committee's propaganda activities designed to bolster its censorship system is its recent publication of four popularized pamphlets in question and answer form: "*100 Things You Should Know About—Communism in the U. S. A.; Communism and Religion; Communism and Education; Communism and Labor* (Govt. Printing Office). These pamphlets are not reports to Congress, but are on public sale at ten cents each. So far from reporting on results of investigations of "un-American" propaganda, these deal with such subjects as "Was Marx Crazy?" (Answer: "Perhaps") (in *Communism and Religion*, p. 5); "Was Russia a very religious country before?" (The answer is obscure.) (*id.*, p. 7); "Does Stalin let American Communists in to see him?" (Answer: "Yes") (*Communism in the U. S. A.*, p. 14); "What is treason?" (Answer quotes the Constitution) (*id.*, p. 17); "Are the Communists committing treason today?" (Answer: they are committing "cold war treason") (*id.*, p. 17); "But don't we have more of all the best natural resources than any other people?" (Answer: no. Russia has a lot of natural resources) (*Communism and Education*, p. 11); "What about the Wallace youth groups?" (Answer: "More tools of the Communist Party") (*id.*, p. 17); "What happens if a Russian wants to quit his job?" (The answer is obscure except as to admonition to read "I Chose Freedom" by Victor Kravchenko.) (*Communism and Labor*, p. 7).

The Committee published under date of December 18, 1948 a pamphlet entitled, "Citations by Official Government Agencies of Organizations and Publications Found To Be Communist or Communist Fronts." This lists in alphabetical order 531 organizations and 87 publications

and shows which government agencies have cited them as being Communist or Communist Fronts. Needless to say, the list was compiled and published without the organizations named having been given hearings or opportunity for self-defense. The "official government agencies" consist chiefly of the Committee itself and of the California and Massachusetts "little un-American Activities Committees." They also include the Attorney General, "Pennsylvania Commonwealth Counsel before the reviewing board of the Philadelphia County Board of Assistance" (*e. g.*, pg. 3), the New York Rapp-Coudert committee (*e. g.*, pg. 13), and others. Among the organizations cited are: Allied Voters against Coudert; American Friends of Spanish Democracy; American Investors Union, Inc.; American Labor Party; American Relief Ship for Spain (whose citation is by the Committee itself for raising "funds for the Communist end of that civil war"); Book Find Club; Citizens Committee for Harry Bridges (cited by Committee itself as having been "formed to oppose deportation of Harry Bridges, Communist Party member"; *cf. Bridges* v. *Wixon*, 326 U. S. 135); Citizens' Committee to Aid Locked-Out Hearst Employees; [Los Angeles] City Action Committee against the High Cost of Living; Committee for a Boycott against Japanese Aggression; Committee for the First Amendment; Committee of One Thousand; Committee to Defend Angelo Herndon (*cf. Herndon* v. *Lowry*, 301 U. S. 242); Commonwealth College; Consumers Union; Federated Press; Group Theatre; Independent Citizens Committee of the Arts, Sciences, and Professions; International Juridical Association; Joint Committee of Trade Unions on Social Work; League of Women Shoppers; Methodist Federation for Social Service; Milk Consumers Protective Committee; Mooney Defense Committee (*cf. Mooney* v. *Holohan*, 294 U. S. 103); National Committee to Abolish the Poll Tax; National Lawyers' Guild; Nature Friends of America (cited by Massachusetts committee as "another method of recruiting Communist support by means of outdoor activi-

ties"); Non-Partisan Committee for the Re-election of Vito Marcantonio; Progressive Citizens of America; Scottsboro Defense Committee. (*cf. Powell v. Alabama*, 287 U. S. 45; *Norris v. Alabama*, 294 U. S. 587); Southern Conference for Human Welfare; Sweethearts of Servicemen (cited by Committee itself: "Its maiden effort was a delegation of 75 young women who arrived in Washington to petition Congress 'to give their soldier boy friends and husbands the chance to vote in the 1944 Presidential elections.'").

The Committee's censorship applies not only to publication of opinion, but to the right of assembly generally. It is not only the propaganda of an organization that is "exposed" to public lynch law, but the organization itself. Thus the Committee has boasted that it "had a large part in breaking up the People's Front" and in diminishing the prestige and following of the American Youth Congress. (H. R. Rep. No. 1, 77th Cong., 1st Sess. 21 (1941)). It is as if a board of censors suppressed not only a book but its publishers as well.

In a system of direct censorship, the censoring agency would presumably be subject to rules which would conform with procedural due process. No such rules apply to or are used by the Committee. Findings of "subversiveness," the equivalent of an edict of suppression, are often made without giving any hearing to those concerned, as was the case with the report on the Southern Conference for Human Welfare (see Gellhorn, *op. cit.*), and in no case does the Committee recognize rights of confrontation, cross-examination, putting on of rebuttal evidence, etc. "The rights you have," said Chairman Thomas when he directed counsel for a witness to testify, and counsel insisted that he in turn had a right to counsel, "are the rights given you by this committee. We will determine what rights you have and what rights you have not got before the committee." *Espionage Hearings, supra*, at 1310.

In implementing its censorship functions, the Committee persistently abuses its powers of process. One instance is presented by the record in this case, involving as it does the illegal arrest of the petitioner and the issuance of the contempt citation for reasons unconnected with an interest in obtaining testimony (see *infra*, footnote 5). Others involve the exacting from witnesses of compurgatory oaths and the prying into their political beliefs, as in the Hollywood hearings (*op. cit.*). Witnesses who claim their constitutional privilege against self-incrimination are relentlessly badgered (*cf. Espionage Hearings, supra,* 1329-1341; 818-835), as is their counsel (*id.* 1308-1310). On one occasion, the Committee forced counsel for a witness to testify because it disliked the witness' claim of privilege (*ibid.*, and at 1342-1346), and recently it harassed a witness because the counsel he had consulted represents the petitioner in this case. *Washington Evening Star* (final edition), Dec. 9, 1948, p. A-5; *Washington Post*, Dec. 10, 1948, p. 8; *N. Y. Herald Tribune*, Dec. 10, 1948, p. 16.

Witnesses are called upon not to supply information by testimony, but so that they may "clear themselves" and are cited for contempt if they disavow the opportunity. They become "defendants" under a burden of proof, and are publicly invited to subject themselves to lie-detector tests.

> Hiss will be given every opportunity to reconcile the conflicting portions of his testimony, but the confrontation of the two men and the attendant testimony from both witnesses has definitely shifted the burden of proof from Chambers to Hiss, in the opinion of this committee. [Interim report of the Committee in *Espionage Hearings, supra*, at 1349.]

The Committee's hearings are elaborately staged publicity performances, replete with all attendant modern paraphernalia—flood lights, radio recorders, still cameras, mo-

tion picture cameras, etc.,—and designed to develop at least one good headline story a day. One of the recurring features of these "hearings" is the impaling for public edification of witnesses whom the Committee dislikes. (For a description of one such "hearing" see Martha Gellhorn, *Cry Shame*, New Republic, Oct. 6, 1947, p. 20.) No one, least of all the Committee, anticipates that these witnesses will furnish information for legislative guidance; their function is to be the object of a gladiatorial sport. Thus it is a Committee practice to hold open hearings for the sole purpose of "hearing" witnesses who, as they know on the basis of a closed session, will not furnish information but will claim their constitutional privilege against self-incrimination. "As soon as the witness arrives, he [Acting Committee Chairman Mundt] said, he will be questioned behind closed doors 'to find out what material is available.' If he refuses to answer the committee's questions, Mr. Mundt went on, the hearing will become public. That was the procedure followed yesterday when the committee questioned Mr. Wadleigh, who refused to tell the committee whether he ever gave any restricted State Department documents to Mr. Chambers or ever belonged to a ring organized to furnish American secrets to a foreign power." *Washington Evening Star*, Dec. 10, 1948, p. A-6.

Where the Inquisition, then, had its rack, the Committee has its hearing, the difference being that the advance of culture and refinement has substituted mental and nervous torture for physical torture.

We do not argue that the Committee is invalid merely because it has sinned, even though, so far as we can discover, it has never done anything else. The point is that the Committee was intentionally and inevitably vested with censorship functions when it was equipped with formidable powers of inquiry which, on the one hand, were not limited by any concept capable of application and, on the other, were oriented by language which requires an invidious

classification of ideas and expressions. Without restraint and with such orientation, the Committee on Un-American Activities erected its system of censorship quite naturally and within the legislative grant of authority. "The case is," said Justice Edgerton, dissenting in *Barsky's* case, *supra*, at 259, 260, "as if the enabling Act read 'The Committee shall expose unorthodox propaganda in order to restrain and punish it.'" The key features of this censorship system may be summarized as follows:

1. The function of the Committee is to exercise censorship through the use of its powers of inquiry and compulsion of testimony.

2. The basic technic of the censorship is to "expose" to adverse public sentiment individuals and organizations holding views of which the Committee disapproves. The purpose of this "exposure" is not primarily to harm those individuals and organizations, though that result follows, but to fulfill the true function of censorship—*i. e.*, the suppression of ideas which are deemed harmful to the political, social or economic interests of those who institute the censorship.

3. In order that this technic be effective, it is important that "exposure" bring drastic consequences to those "exposed." Rather than leave the advent of such consequences wholly to fortune, the Committee stimulates their operation by such methods as setting up blacklists of its own and hounding public and private employers to follow suit.

4. It is also important to this technic that whatever is "exposed" have an ugly appearance to the general public. Since not all the individuals, organizations and ideas disliked by the censors would have such an appearance if fairly presented, it is frequently necessary for the Committee to present them unfairly—i. e., to smear when "exposing."

5. But in order to make sure that the smear will be successful, the Committee can not afford to use methods of procedural due process, since these might enable a selected victim to defeat the smear.

6. The essence of the smear tactics is to identify an individual or organization with something unpopular—ordinarily, Communism. The Committee, therefore, from time to time seeks to strengthen the popular feeling against Communism. This it does by creating propaganda of its own against Communism, as in the case of its public spy-hunts and popularized pamphlets, and by coercing media like the movies into creating similar propaganda.

7. The success of the technic is dependent on the extent and nature of the publicity given to the Committee's exposures. Therefore, the Committee stages spectacles, which it calls "hearings," designed to attract the utmost publicity. When a witness frustrates this purpose, at least in part, by refusing to testify, the Committee bitterly reacts and attempts to punish him and his counsel.

The question to be here decided is whether this fabulous system is consistent with the Constitution.

C. The Committee and the Constitution.

1. *The First Amendment.*

"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble." By these words, the founders of a nation sought at once to protect the human impulse of self-expression and to preserve popular self-government. "The First Amendment protects two kinds of interest in free speech. There is an individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course but carry it out in the wisest way." Chafee, *Free Speech in the United States* (1942) 33.

The founders understood that people govern themselves only when they are free to choose, and that freedom of choice does not exist without freedom to hear all the alternatives offered. "The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them." Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948) 88, 89. "The safeguarding of these rights [of speech and press] to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government." *Thornhill v. Alabama,* 310 U. S. 88, 95.

The suppression of public discussion of doctrines that are considered dangerous or in periods that are considered critical is, then, a negation of self-government itself. It assumes that self-government can be trusted to operate only at non-critical times and on non-controversial issues. The founders of our nation, however, trusted no other form of government. Accordingly, "freedom to differ is not limited to things that do not matter much." *W. Va. Bd. of Education v. Barnette,* 319 U. S. 624, 642. Doctrines must be allowed a hearing even though they threaten vested economic and social interests. "If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." Holmes, J. dissenting in *Gitlow v. New York,* 268 U. S. 652, 673. The founders were fearful not of what the people would choose, but that they would be denied the right to choose. "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty." Brandeis, J. in *Whitney v. California,* 274 U. S. 357, 377. It is only by free discussion,

not by a fearful suppression of discussion, that truth can be attained. "Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in these fields may be refuted and their evil averted by the courageous exercise of the right of free discussion." *Thornhill v. Alabama, supra*, at 95.

The state, therefore, cannot proscribe doctrine or censor expression as being dangerous or false.

> But it cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us. [Jackson, J., concurring in *Thomas v. Collins*, 323 U. S. 516, 545.]

The authority of the Committee on Un-American Activities is an express mandate to classify doctrines as false ("un-American") and dangerous ("subversive"). It thus on its face negates the basic purpose of the First Amendment, which, as we have seen, withdraws from governmental bodies the power to declare that there are certain ideas which the people cannot be trusted to hear and to judge for themselves.

The question here is not whether Congress can investigate speech, it is whether it can determine and publish that certain doctrines are officially regarded as dangerous. The First Amendment prohibits any governmental determination of religious heresy. *United States v. Ballard*, 322 U. S. 78; *Cantwell v. Connecticut*, 310 U. S. 296. By the same token (*Prince v. Massachusetts*, 321 U. S. 158, 164), it must prohibit governmental determination of political or economic heresy, and this must be true even if the

search for heresy is conducted in the alleged interests of the security of the state. The First Amendment prohibits such trials as that of Socrates, who was condemned, after a trial with full Athenian due process, of propagating doctrine which corrupted the youth.

Nor can the Committee be sustained on any theory that its classification of ideas, though invidious, is merely academic because it cannot impose a direct sentence like that which was meted to Socrates. Nothing is clearer than that the Committee's inquiry into speech necessarily, under its frame of reference, restricts speech. "That the Committee's investigation does in fact restrict speech is too clear for dispute. The prosecution does not deny it and the court concedes it." Edgerton, J., dissenting in *Barsky v. United States, supra*, at 255.

The fact is that the Committee on Un-American Activities is so effective that it not merely restrains speech, it threatens to destroy freedom of speech (and thus self-government) altogether. Through its untiring efforts, the Committee has made incalculable inroads on the democratic process. "The effect," says Justice Edgerton (dissenting in *Barsky's* case, *supra*, at 255), "is not limited to the people whom the Committee stigmatizes or calls before it, but extends to others who hold similar views and to still others who might be disposed to adopt them. It is not prudent to hold views or to join groups that the Committee has condemned. People have grown wary of expressing any unorthodox opinions. No one can measure the inroad the Committee has made in the American sense of freedom to think. There has been some suggestion that it restrains only timid people. I think it nearer the truth to say that, among the more articulate, it affects in one degree or another all but the very courageous, the very orthodox, and the very secure." Thus the Committee's Hollywood hearings have intimidated workers in an entire industry, and have had a stultifying effect on the product

they offer to the public. See Ross, *Come In Lassie!*, The New Yorker, Feb. 21, 1948, p. 32.

To the Committee can be traced directly or indirectly, as a result of its pressures or in imitation of its successes, virtually all manifestations of the growing tendency of suppression of civil liberties. It is the Committee which is entitled to most of the credit for the rash of federal and state "loyalty" orders, official proscriptions of organizations, political deportations, political prosecutions, imprisonment for refusal to answer questions relating to political opinions and beliefs, police interference with political meetings, and inquisitions by state "little un-American" committees.

It is preposterous to say that a Committee which has so curtailed freedom of speech and assembly is consistent with the First Amendment. If the First Amendment permits inroads of such an extent into this freedom, it has no vitality and might as well not exist at all. The First Amendment serves little purpose if it can only strike down relatively insignificant legislative aberrations like compulsory flag salutes while leaving intact so pervasive and purposive a censorship as that imposed by the Committee on Un-American Activities. The Committee and freedom of speech are mutually exclusive, and the First Amendment cannot survive if the Committee can. See Emerson and Haffield, *op. cit.*, 8-14, 20-26.

As we have seen, it is not disputed that the Committee's inquiries restrict speech. And it is apparent that this restriction flows not merely from the irresponsible practices of the Committee, but from the fact that its charter requires it to classify doctrines as dangerous and false on the basis of the subjective prejudices and personal interests of the Committee members. Under orthodox analysis, legislation which restricts speech is invalid unless saved by the "clear and present danger" doctrine. For present purposes, it is unnecessary to discuss whether the "clear and present danger" exception applies to discussions of public issues, the field in which the Committee operates, although

we think it clear that it does not. *Cf.* Meiklejohn, *op. cit., passim.* This is because the Committee's authority is neither limited by, nor directed to, any such concept. Under the wholly illusory standards of its charter, the Committee, as we have seen, may and does inquire into, *i. e.*, restrict, whatever speech and assembly it chooses.

Nor can the Committee be saved by any judicial construction narrowing its jurisdiction or because some of its inquiries may be within the Congressional power. A statute may not be saved by narrowing construction if on its face it permits interference with the freedoms guaranteed by the First Amendment, for the mere existence of such a statute is itself a restraint on speech. *Thornhill v. Alabama, supra; Winters v. New York,* 333 U. S. 507; *Stromberg v. California,* 283 U. S. 359, 369; *Herndon v. Lowry,* 301 U. S. 242, 258. Furthermore, a narrowing construction would be contrary to the legislative purpose to give the Committee a boundless discretion and would be completely at variance with the Committee's operations and activities. The legislation contains no ascertainable standards to which the Committee may be confined. Hence an attempted saving construction would be outright judicial legislation. *United States v. Reese,* 92 U. S. 214, 221.

Finally, just as the convictions set aside in the *Thornhill* and *Stromberg* cases could, for all the records showed, have been based on a full application of a statute which on its face was unconstitutional, so here, for all the record shows, the subpoena which was served on petitioner could have been issued under a plenary, and therefore invalid, construction of the Committee's authority. There is nothing here from which it may be supposed that the Committee was acting within narrower limits than appear on the face of its charter.

The decisions which have sustained the Committee, *Barsky v. United States,* 167 F. (2d) 241, and *United States v. Josephson,* 165 F. (2d) 82, are alike in their reasoning.

In both cases, the majority ruled that Congress has power to inquire into threats to the national security ("threats to the existing form of government by extra-constitutional processes of change," *Barsky's* case at 246; "the seeds of revolution," "matters which potentially affect the very survival of our Government," *Josephson's* case at 88, 89). In both cases, the majority conceived that the First Amendment is not involved because it would be applicable only to legislation which might result from the inquiry, the nature of which is speculative. Thus, said the court in *Barsky's* case, at 246, the cases on the First Amendment and the clear and present danger rule "dealt with statutes which actually imposed a restriction upon speech or publication." (But, at 250, "We assume, without deciding, for purposes of this case, that compulsion to answer the question asked by the Congressional Committee would impinge upon speech and not merely invade privacy.")

The errors in this reasoning are obvious.

First, the power of Congress to inquire into threats to our security is not involved. As we have seen, the Committee's authority is not channelled into any such direction. It can and does investigate any propaganda it pleases. If Congress had wished to investigate propaganda which seeks to instigate revolution, it could have drafted an authorization in terms apt for that purpose.

The *Josephson* and *Barsky* courts have apparently succumbed to the Committee's own untrue propaganda, assisted by the reference to "activities" in its title and by such extra-jurisdictional inquiries as its spy hunts, that it is preserving the country from violent revolution. Even if this were true, which it is not, such an activity would be beyond its written authority. Contrary to a popular misconception, the Committee has no jurisdiction to investigate acts of espionage, sabotage, treason and terrorism, or conspiracies to overthrow the government by violence.

Secondly, assuming that Congress has the power to inquire into threats to our security, the First Amendment prohibits it from exercising that power in such a way as to abridge freedom of speech and assembly. This obvious point both the *Barsky* and *Josephson* decisions miss by assuming that the First Amendment applies (or, perhaps, applies in full force) only to the legislation, if any, which is enacted following the inquiry, and not as well to the exercise of the inquiry power itself. The reason why the Committee is unconstitutional under the First Amendment, however, has nothing to do with any legislation other than that which empowers the Committee. It is this latter legislation which is invalid because it constitutes a use of the power of inquiry to abridge freedom of speech and assembly. We have seen that the Committee's inquiry authority in fact censors expression, and that this censorship flows inevitably from the vagueness of its standards and the circumstance that they presuppose a classification of doctrines as dangerous and false.

The key point missed by the *Josephson* and *Barsky* cases —that the First Amendment limits the power of inquiry itself — hardly needs demonstration. The First Amendments limits *all* the powers of Congress. The grant of inquiry authority to the Committee is itself a legislative act subject to constitutional restrictions, as much so as legislation passed as a result of the inquiry. "The First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws or all except tax laws." Stone, J., in *Jones v. Opelika*, 316 U. S. 584, 609 (dissent, adopted as majority view in 319 U. S. 103). It cannot be assumed that the power of inquiry, an implied power which is ancillary to the exercise of the powers expressly delegated to Congress, has an immunity from the First Amendment that is not enjoyed by the expressly delegated powers themselves.

The reason why the majority in both cases missed this point apparently stems from a misconception that the First

Amendment applies only to legislation which directly interdicts speech. Such is the explanation for the assertion in *Barsky's* case, already quoted, that the First Amendment cases "dealt with statutes which actually imposed a restriction upon speech or publication" and for the assertion in *Josephson's* case (at 92) that the Constitution only protects freedom of speech from "legal process."

The fact is, however, that the First Amendment prohibits *any* legislative restraint of speech and assembly (subject to the possible clear and present danger exception), whether it is a direct interdiction or a less direct or disguised restriction. *Cf. Grosjean v. American Press Co.*, 297 U. S. 233; *Murdock v. Pennsylvania*, 319 U. S. 105; *Jones v. Opelika*, 319 U. S. 103, adopting dissents in 316 U. S. 584, 601, 610, 622; *Busey v. District of Columbia*, 319 U. S. 579; see discussion of Edgerton, J., dissenting in *Barsky's* case, at 252-255. Thus a compulsory oath of allegiance is invalid because it restricts expression although it does not directly forbid it. *W. Va. Bd. of Education v. Barnette, supra.* Similarly, in *Thomas v. Collins, supra*, a bare requirement that one must register before speaking was held incompatible with the First Amendment. This Court has recognized that withdrawal of second-class mailing privileges may abridge freedom of the press. See *Hannegan v. Esquire*, 327 U. S. 146. And a state prohibition of teaching of a foreign language to a child is an invalid interference with both the teacher's and the child's rights of expression. *Meyer v. Nebraska*, 262 U. S. 390. Indeed, if the First Amendment applies only to legislation which expressly forbids speech, and not also to legislation which otherwise infringes expression, it affords little protection for so vital a right. "It is not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the

whole within official control." Jackson, J., concurring in *Thomas v. Collins, supra,* at 547.

The *Josephson* and *Barsky* cases insinuate that the First Amendment, the prerequisite of free government, will endanger free government if applied to the inquiry power. This argument has consistently been urged as to application of the Amendment to all powers. The inquiry power is no more essential to the federal government than is the police power to state governments, and in any case there is no warrant to suppose that obedience to the First Amendment produces a weak government. "Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end." *W. Va. Board of Education v. Barnette, supra,* at 636, 637. To immunize any power from the First Amendment simply confesses a lack of faith *pro tanto* in the Amendment itself and permits an exception which may be used to destroy the rights it guarantees.

2. *The Fourth Amendment.*

The Committee is authorized to compel testimony in the course of its investigations. As we have seen, the scope of the Committee's investigations into speech is neither defined nor limited by its charter. It follows that its subpoena powers are likewise undefined and unlimited.

In this respect the Committee's subpoena powers violate the Fourth Amendment, since the constitutional prohibition of unreasonable searches and seizures condemns the avail-

ability and use of process to compel testimony without adequate, foreknown standards for the inquiry. *Jones v. SEC*, 298 U. S. 1; *Re Pacific R. Comm.*, 32 Sawy. 559, 32 Fed. 241. *Cf. Ellis v. ICC*, 237 U. S. 434; *Kilbourn v. Thompson*, 103 U. S. 168, 196; *FTC v. American Tobacco Co.*, 264 U. S. 298, 305-307.

The Fourth Amendment prohibits "unlawful inquisitorial investigations," which were among the "intolerable abuses of the Star Chamber." *Jones v. SEC*, *supra*, at 28. "An investigation not based upon specified grounds is quite as objectionable as a search warrant not based upon specific statements of fact. Such an investigation, or such a search, is unlawful in its inception and cannot be made lawful by what it may bring, or by what it actually succeeds in bringing to light." *Id.* at 27.

The Committee's authority and conduct fall squarely within the condemnation voiced in the following passage from *Re Pacific R. Commission*, *supra*, at 263, which was quoted with approval in the *Jones* case (at 27):

> A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing where the practice under it would end.

The Committee has so used its subpoena powers that "no more extensive search into the hearts and minds of private citizens can be thought of or expected." Clark, J., dissenting in *United States v. Josephson*, *supra*, at 93. Its compulsion on witnesses to take oaths publicly as to their opinions and belief goes far beyond the compulsion to take an oath of allegiance which this Court struck down in *W. Va. Board of Education v. Barnette*, *supra*.

Congress, of course, has powers of investigation. In the case of the Committee, however, it has asserted the power to investigate opinions and expressions without limit. It infringes "the right to be let alone — the most comprehensive of rights and the right most valued by civilized men." Brandeis, J., dissenting in *Olmstead v. United States*, 277 U. S. 438, 478. In the *Sinclair* case, *supra*, the Court, in a case dealing with the Congressional inquiry powers, stated (at 292): "It has always been recognized in this country, and it is well to remember, that few, if any, of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs."

For these reasons, the Commitee's powers violate the Fourth Amendment as well as the First.

3. *The Fifth and Sixth Amendments.*

The Committee's "exposures," as we have seen, punish the persons and organizations "exposed" by subjecting them to the sanctions of a hostile public sentiment. This punishment is imposed on those who have, in the Committee's opinion, violated its code of censorship.

The Committee's authority thus violates the Fifth and Sixth Amendments since it permits punishment without the requirements of procedural due process, such as a fair hearing and adequate opportunity for self defense. Nor is the Committee saved by the circumstance that the punishment which it imposes is not incorporated in formal judgments and that its nature and degree is not directly set by the Committee itself. On the contrary, further violations of due process arise out of these very respects, for it is obvious that due process requires some regularity in the processes of conviction and sentencing. If the Committee throws one of its victims to the lions it can hardly escape

responsibility on the ground that (1) it was in too great haste to impose a formal sentence of death by lions, and (2) besides the damage was done by the lions and not by the Committee.

Furthermore, the Committee's punishment is imposed for violation of a censorship code which is not published and is incapable of advance determination. The Committee's authority thus violates due process by permitting punishment on charges not made (*Cf. Cole v. Arkansas*, 333 U. S. 196; *DeJonge v. Oregon*, 299 U. S. 353, 362) and for conduct not proscribed in advance by adequate standards of guilt. *Connally v. General Construction Co.*, 269 U. S. 385; *Lanzetta v. New Jersey*, 306 U. S. 451; *Winters v. New York*, *supra*; *Pierce v. United States*, 314 U. S. 306, 311.

Finally, the contempt statute itself cannot be constitutionally applied to punish the withholding of testimony from the Committee. A witness "may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry." *McGrain v. Daugherty*, 273 U. S. 135, 176. Since the statute punishes the withholding of only pertinent testimony, *Sinclair v. United States*, *supra*, there must be some standard to determine what is and what is not pertinent to the scope of the Committee's inquiry. *Cf. M. Kraus & Bros. v. United States*, 327 U. S. 614, which held that a statute penalizing a violation of an indefinite regulation cannot be constitutionally applied. As we have shown above, the statute establishing the Committee is without standards, and the scope of the Committee's inquiry into propaganda is determined only by the personal prejudices of the members of the Committee. This standard of the personal prejudices of members of the Committee — or rather this lack of standard — obviously does not satisfy the requirement of the Fifth Amendment that a penal statute furnish adequate standards for the guidance of those whose conduct it governs. See cases cited *supra*. Since no one can fairly say, because of the vagueness of the Committee's authority,

what is or is not pertinent to the Committee's jurisdiction, the criminal penalty cannot be validly applied to punish resistance to an assertion of that jurisdiction.

4. *The Ninth and Tenth Amendments.*

Congress has only the powers delegated to it by the Constitution, and the inquiry power is implied only to assist its execution of its delegated powers. *Kilbourn v. Thompson, supra; McGrain v. Daugherty, supra; Jurney v. MacCracken, supra.* Contempt of Congress is punishable only for obstruction of a legislative function. *Marshall v. Gordon,* 243 U. S. 521.

The Committee's inquiry authority, however, is unlimited, and thus goes beyond the scope of the delegated powers. As we have already seen (this part, *supra,* B. 2(a) and (b)), it is acknowledged that the Committee's inquiries are designed to go beyond any power of substantive legislation. Furthermore, no delegated power exists for censorship of opinion and expression distasteful to the legislature. Accordingly, the Committee's authority contravenes the Ninth and Tenth Amendments.

II. The Judgment Below Must Be Reversed Because of an Absence of Proof That Petitioner Was Summoned to Testify on Matters of Inquiry Committed to the Committee and Because of the Exclusion of Evidence That the Committee Was Acting Improperly and Beyond Its Authority.

The indictment alleges that the petitioner was "summoned as a witness . . . to give testimony before the . . . Committee . . . *upon matters of inquiry committed to said Committee by Public Law No. 601, Section 121, and aforesaid Resolution 5,* . . . and was directed to be sworn to testify *on said matters.* . . ." (R. 215, emphasis supplied).

At the trial, no evidence whatever was introduced in sup-

port of the italicized phraseology. As Justice Prettyman stated in his dissent below (R. 244, 170 F. (2d) at 284):

> This record does not show, and we do not yet know, what it was that the Committee wanted appellant to testify about. The subpoena merely directed the marshal to summon him 'to testify touching matters of inquiry committed to said Committee'; it did not describe or name any such matter. He was not told by anybody, so far as the record shows, what the matters were concerning which he was to testify. There is no shred of evidence that he was summoned as a witness upon a matter under inquiry before the Committee, but the statute requires that he must have been summoned upon such a matter.

The prosecution, thus, failed to prove any facts from which it could be concluded:

(1) That the inquiry in connection with which the Committee summoned the appellant was within the scope of the authority assigned to it by Congress. For all the record shows, the Committee might have been wishing to inquire into the habits of bees or some other subject equally remote from the dissemination of propaganda, whether "American" or "un-American."

(2) That the inquiry was within the scope of the powers of Congress.

(3) That there was any matter at all under inquiry before the Committee.

The record reveals not only a failure on the part of the prosecution to prove these points but also that the petitioner was not permitted to prove their negatives — *i.e.*, that the Committee was acting beyond its authority and the authority of Congress and that it had no matter under inquiry. Prior to trial the petitioner moved for a bill of particulars "setting forth in detail the specific matters concerning which the defendant was summoned to give testimony before the Committee" (R. 221). This motion was denied (*ibid.*). At the trial the court refused to permit the

defense to prove that the Committee had not summoned the petitioner in order to elicit any information in a matter of inquiry committed to it by Congress or in the exercise of any power given to it by Congress, but rather to harass and punish him for his political beliefs and to prevent his departure from the United States and his return to Germany (R. 68-71, 79, 80, 88-90, 100-102, 104, 105, 119-120). The trial court's position in excluding this offer of proof was, "I have to assume, and I shall assume, that the Committee was making an investigation for proper purposes within the power of Congress" (R. 120). This proof having been offered and excluded, it must, for present purposes, be regarded as established.[5]

Under established principles and authorities, it is clear that the trial court erred in denying judgment of acquittal for the lack of proof as to the subject-matter of the Committee's inquiry, if any, and in excluding the proffered evidence. Hence the court below erred in affirming the conviction.

The recitation in the indictment that the petitioner was summoned to testify on matters of inquiry committed to the Committee was an essential allegation under the statute and the Constitution. It therefore had to be proved. In *Sinclair v. United States, supra,* involving a prosecution under the same statute, the Supreme Court expressly recognized the need for pleading and proving that the testimony

[5] We think it appropriate to point out that a majority of the Committee membership revealed its intentions regarding the petitioner in statements made on the House floor on the resolution, proposed by the Committee, to cite petitioner for contempt. See 93 Cong. Rec. 1177-1180 (Rep. Nixon), 1181-1182 (Rep. Rankin), 1182-1184 (Rep. Bonner), 1184-1186 (Rep. Mundt), 1186-1187 (Rep. Vail), cited at R. 105. These representatives did not complain to Congress that petitioner had frustrated an attempt by their Committee to get information, but suggested that his alleged default furnished a good excuse to punish a person whom the Committee dislikes. Thus Mr. Nixon stated (at 1180): "The resolution [to cite petitioner for contempt] before the House today proposes a very simple and direct question. By adopting the report of our committee concerning an obvious contempt, this House can put Mr. Eisler out of circulation for a sufficient period of time for the Department of Justice to proceed against him on more serious charges."

sought was pertinent to an authorized inquiry of the Congressional Committee. The Court stated (at 296, 297):

> Appellant earnestly maintains that the question was not shown to be pertinent to any inquiry the committee was authorized to make. The United States suggests that the presumption of regularity is sufficient without proof. But, without determining whether that presumption is applicable to such a matter, it is enough to say that the stronger presumption of innocence attended the accused at the trial. It was therefore incumbent upon the United States to plead and show that the question pertained to some matter under investigation.

It is apparent that if, as the courts below ruled, the prosecution need not prove that the inquiry was within the authority of the Committee and the Congress, and the defense may not prove the contrary, then there is no longer any force in the long-established doctrine of this Court that judicial review is available to protect individuals from unwarranted and unconstitutional legislative inquisition. See *supra*, p. 9; *Kilbourn v. Thompson, supra; In re Chapman, supra; McGrain v. Daugherty, supra; Jurney v. MacCracken, supra.* The establishment by the trial court of an irrebutable presumption that the Committee was acting properly and within the powers of Congress finally gives realization to the apprehensions which Justice Brandeis and proponents of the contempt statute thought necessary to quiet. Thus Senator Bayard, answering those who opposed the bill as dangerous to the rights of the people, said in the debates on passage of the legislation (Cong. Globe, 34th Cong., 3d Sess., pp. 439, 440, Jan. 23, 1857):

> I am aware that legislative bodies have transcended their powers — that under the influence of passion and political excitement they have very often invaded the rights of individuals, and may have invaded the rights of coordinate branches of the Government; but if our institutions are to last, there can be no greater safeguard than will result from transferring that which now stands on an indefinite power (the punishment as

well as the offense resting in the breast of either House) from Congress to the courts of justice. *When a case of this kind comes before a court, will not the first inquiry be, have Congress jurisdiction of the subject matter? — has the House which undertakes to inquire, jurisdiction of the subject? If they have not, the whole proceedings are coram non judice and void, and the party cannot be held liable under indictment.* The court would quash the indictment if this fact appeared on its face; and if it appeared on the trial, they would direct the jury to acquit. [Emphasis supplied.]

The courts below also overruled, by their presumption, the principle that contempt of Congress is constitutionally punishable only for acts which "obstruct the performance of the duties of the legislature." *Jurney v. MacCracken, supra,* at 148; *cf. Marshall v. Gordon, supra.*

This denial of the right of judicial review to one brought into Court on a charge of contempt repudiates our constitutional form of government. There is no reason for a doctrine that actions of Congressional committees are not subject to check in accordance with the Constitution and statutes to the same extent as are actions of officials of the executive department or the judiciary. There is no reason why actions of legislative committees are entitled to a greater deference or to a greater immunity from constitutional limitations than statutes passed by the entire legislature. And it is a dangerous infringement of the bill of rights to prevent a challenge of Committee action as contrary to the bill of rights.

The majority opinion below wholly ignored the circumstance that there was no proof of the subject-matter of the inquiry, if any, although this issue was briefed and argued before the court and is treated in Justice Prettyman's dissent. The majority opinion does, however, devote a paragraph (R. 237, 170 F. (2d) at 278, 279) to the exclusion of the proffered proof regarding the purpose of the Committee's summons. This paragraph first chides defense coun-

sel for attempting to "becloud the real issue in the case" by offering this proof. It then gives an abbreviated and garbled version of what was offered, even omitting the fact that the offer expressly included proof that the summons was for no purpose "within the scope of the Committee's power" and was "not to elicit any information upon a matter under inquiry committed to them by Congress" (R. 102). It then concludes (emphasis supplied): "The lower court properly refused to admit such evidence, on the ground that the court had no authority to scrutinize the *motives* of Congress or one of its committees."

It is abundantly clear that the defense was seeking to prove at trial that the Committee had no legislative purpose in summoning the petitioner, was discharging no legislative function, and was seeking to punish him for his political beliefs. This proof was relevant to the validity of the summons, it was relevant under the indictment and the contempt statute, and it raised obvious constitutional and statutory defenses. The appellate court's dismissal of these issues as going to the *motives* of Congress is without substance. Of course the motives of a Congressional committee in making an inquiry having a legislative purpose and function are not subject to judicial scrutiny. But it is utterly cavalier to dismiss a contention that the Committee was not exercising a legislative purpose and function by labelling it as an attack on "motives."

The conviction of the petitioner was, therefore, erroneous under the statute and the indictment, and was also a denial of due process, of his right under the Fourth Amendment to be free from unlawful inquisition, of his right to freedom of thought under the First Amendment, and of his right to freedom from the impact of unauthorized federal power under the Ninth and Tenth Amendments.

III. The Petitioner Can Not Be Punished for Withholding Testimony from the Committee Under the Circumstances of His Appearance as Shown by the Record and Offered to Be Proved

As set out in our statement of facts, the petitioner, upon being served with the Committee's summons, prepared to appear at the hearing in Washington on February 6, 1947 (R. 12, 110, 111). On February 4, 1947, however, he was arrested as an "enemy alien" by officers of the Immigration and Naturalization Service, held in custody for two nights, taken in custody to the hearing, and then held in custody. (R. 80, 81, 82, 83, 85, 123, 125, 13, 30). For present purposes, there must be taken as proven the evidence offered by petitioner and excluded by the trial court — *i.e.*, that the arrest was instigated by the Committee to punish him for his political beliefs (R. 79, 80, 88, 89, 100), and that the arrest was illegal in that (a) the petitioner was, as the Department of Justice knew, an Austrian national and hence not an enemy alien (*United States ex rel. Schwartzkopf v. Uhl*, 137 F. (2d) 898); (b) the arresting officers neither had nor exhibited a warrant of arrest; and (c) the government had earlier discontinued the arrest and internment of enemy aliens.

The transcript of the hearing before the Committee shows that the petitioner stated to the Committee at least three times (R. 44, 46, 47) that he would take the oath and testify if he were first allowed three minutes in which to make a few remarks. For present purposes there must also be taken as established the offered proof, excluded by the trial court, that the petitioner wanted to utilize the three minutes to make an objection to his being arrested and being compelled to take the oath and testify.[6]

[6] The proof offered included evidence of the contents of the intended three-minute statement (R. 133, 134, 135, 138, 139), testimony that petitioner's counsel had advised him that petitioner, and only petitioner, had a right to make objections to the Committee (R. 122, 126, 133, 146, 149, 150), testimony that petitioner believed he had basis for objection (R. 119, 120), and testimony that he would have taken the oath and testified after he had made his objections (R. 135).

Under the circumstances of his production before the Committee, the petitioner, we submit, had a Constitutional right to refuse to testify at that time, and certainly he had a Constitutional right to insist on making an objection before testifying. The Committee's action in causing the illegal arrest of the petitioner and in having him brought before it publicly in humiliating custody was as much subject to the bill of rights as any other legislative act. This action clearly deprived the petitioner of his liberty without due process of law. To subject him to inquisition under such ignominious circumstances was a deprivation of his rights under the Fourth Amendment. The courts, we suggest, should not lend themselves to the furthering of so palpable an abuse of process. A witness who is unlawfully arrested and hauled before a committee does not voluntarily appear and cannot be punished for contempt for refusing to testify. *United States v. Dolsen*, D. C. Dist. of Col., Criminal No. 65801, decided June 20, 1946, also involving illegal conduct of the Committee on Un-American Activities.

The bill of rights incorporates "those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses" and condemns actions which fall short "of conforming to fundamental standards of procedure." *Adamson v. California*, 332 U. S. 46, 67, 68 (Mr. Justice Frankfurter concurring), 124 (Mr. Justice Murphy, dissenting). Under all canons of decency and fair procedure, the petitioner was entitled to resist an outrageous deprivation of his liberties and to refuse to cooperate with his persecutors. At the very least, he was entitled to voice his protest before cooperating with them. The petitioner failed to testify solely because of the Committee's illegal and arbitrary conduct, and it offends the Fifth Amendment to permit the Committee to exact the performance of duties from one whom it had illegally deprived of his rights. *Cf. Klapprott v. United States*,

U. S. .... (Jan. 17, 1949). When the petitioner stated, in his colloquy at the Committee hearing with Mr. J. Parnell Thomas, that he was a political prisoner (R. 44, 46), he was factually correct, and when he asserted that "a political prisoner has to do nothing" (R. 47), he was legally correct.

The bald upshot of this case is that the petitioner has been sentenced to imprisonment for one year because he insisted on an opportunity to make a three-minute objection to his illegal and ignominious treatment. We think that the petitioner had a constitutional right to make this objection. See *Townsend v. United States*, 95 F. (2d) 352, 361. But even if he had no such right, he cannot be punished for insisting on making a three-minute objection, especially when he offered to answer questions if allowed to make the objection. This insistence did not "obstruct the performance of the duties of the legislature" and hence may not be constitutionally punished as contempt. *Jurney v. MacCracken, supra*, at 148; *cf. Marshall v. Gordon, supra*. The conviction of the prisoner is punishment for nothing more than lèse majesté of the Committee. We had supposed that the offense of lèse majesté was a feudalistic crime not suitable to a democratic society. The decision below teaches the contrary.

Aside from these constitutional objections, it is clear that, taking the offers of proof as established, the petitioner was not guilty of the offense charged under the statute. The petitioner was indicted for a wilful default of the Committee's summons. An attempt to make a three-minute legal objection to being sworn is, we insist, not a default, and certainly not a wilful default. This is particularly true, in light of Chairman Thomas' reluctant admission that it was a recognized and proper procedure for a person appearing at a Committee hearing to make legal objections *before* complying with the request objected to (R. 49). The petitioner certainly cannot be held to have defaulted in a duty to the Committee if all he tried to do was to conform

to the practice recognized by the Committee itself as proper.

On the point, Justice Prettyman's dissent is particularly illuminating (R. 244, 170 F. (2d) at 284):

> The Chairman of the Committee evaded answering the questions of defense counsel as to the procedure which the Committee had established in respect to the notation of legal objections, but the plain inference of his testimony is that the established procedure was to allow a witness to make his legal objections before being sworn. The purport of appellant's offer of proof was that he had intended to interpose legal objections to being compelled to testify. That proffer must be viewed in the setting of the Committee hearing. The testimony of the Committee Chairman was that the Committee room was "jammed packed with people," and the chief investigator of the Committee testified that there were quite a few photographers present taking photographs. The entire colloquy, which takes a little less than two pages of print, could hardly have taken more than a few minutes. It is true that appellant did state that he was not going to take the stand and refused to be sworn, but he said twice, "I am ready to answer all questions," and twice he said, "I do not refuse to be sworn." Twice he said that he wanted to speak before he was sworn, and twice he quite definitely said that he wanted only three minutes.
>
> If it was the established practice that legal objections be stated by the witness before he was sworn, and if appellant could prove that all he wanted to do was to state his legal objections and thereafter be sworn and "answer all questions", I do not see how he could be held guilty of "willful" default. While bad faith is not an element of willfulness, intent is. Appellant was entitled to prove that he had no intent to refuse to testify but merely wanted to follow the established practice.
>
> The trial court made some reference to appellant's position being that he wished to impose conditions upon his testifying, but I see no merit in that suggestion, if, as a matter of fact, appellant was merely attempting to comply with the established procedure.

It follows from the above that the trial court erred in not permitting the petitioner to prove what he intended to say to the Committee when he asked for three minutes before being sworn (see footnote 6, *supra*) and in denying petitioner's request for charges that the jury must acquit if it found that he had merely attempted to make legal objections to being sworn and to being required to testify (R. 180, requests 19, 20). The evidence offered was relevant to the issue before the jury as to whether petitioner had committed the wilful default charged. It was also error to exclude the proof offered as to the illegal and improper circumstances of the arrest and production of the petitioner. Finally, the conviction of the petitioner in a trial in which he was not allowed to prove these points violates the due process of the Fifth Amendment and the First, Sixth, Ninth and Tenth Amendments.

The majority below agreed (R. 238, 170 F. (2d) at 279, 280) that it was "customary procedure to allow witnesses to state legal objections to the jurisdiction of the Committee before they were required to be sworn." It obviously follows that, contrary to the rulings of the trial court, the jury should then have been allowed to hear evidence on the issue of whether the petitioner was merely attempting to conform to this procedure, and to determine this question of fact under appropriate instructions. The majority below, however, ignored the trial court's errors in this respect. Instead, the majority asserted that the petitioner, despite his repeated reference to "three minutes," "conveyed [to the Committee] the impression he would consume much more" time (R. 238, 170 F. (2d) at 280). The majority also found, completely ignoring the offered and excluded proofs (footnote 6, *supra*), that appellant's request was only "for time to make preliminary remarks" other than objections (R. 238, 239, 170 F. (2d) at 280) and that "his refusal to be sworn effectively constituted a refusal to give testimony except upon conditions which he was not entitled to interpose" (R. 239, 170 F. (2d) at

280). The majority below, therefore, made the same error as the trial court (see *infra*, p. 85) in itself finding, rather than in allowing the jury to find, the crucial issue of fact. It thus usurped the constitutional function of a jury. *Cf. Weiler v. United States*, 323 U. S. 606, 611; *Bollenbach v. United States*, 326 U. S. 607, 614.

IV. The Conviction Should Be Reversed for Failure of the Trial Judge to Disqualify Himself Following the Filing of Petitioner's Affidavit of Bias and Prejudice.

A. The affidavit was substantively sufficient.

Shortly summarized, the affidavit of bias and prejudice makes the following points: (1) As legal adviser to the F. B. I., Justice Holtzoff participated in investigations of aliens and Communists, including a specific F. B. I. investigation of the appellant (an alien and a Communist) which resulted in a report that he is a foreign agent. (2) Justice Holtzoff has a personal hatred of Communists, as shown by his sponsorship of a bill for the deportation of alien Communists and their incarceration in concentration camps and by his admiration for and close friendship with J. Edgar Hoover.

The trial court should have disqualified himself upon the filing of the affidavit, in view of the Act of March 3, 1911, c. 231, sec. 21 (36 Stat. 1090, formerly sec. 21 of Judicial Code, 28 U. S. C. sec. 25, now, slightly revised, 28 U. S. C. sec. 144).

The allegations made in an affidavit of bias and prejudice may not be reviewed for truth or falsity either by the judge against whom the affidavit is addressed or on appeal. On the contrary, the simple issue is whether the allegations "give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *Berger v. United States*, 255 U. S. 22, 33, 34. "The question in all such cases is whether the affidavit asserts facts from which

a sane and reasonable mind might fairly infer personal bias or prejudice on the part of the judge." *Hurd v. Letts*, 80 App. D. C. 233, 234, 152 F. (2d) 121, 122. This rule conforms to the Congressional solicitude, remarked in the *Berger* case (255 U. S. at 35, 36), that "the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial." *Cf. Whitaker v. McLean*, 73 App. D. C. 259, 118 F. (2d) 596.

It is apparent that the affidavit amply satisfies the substantive requirement described and that the policy of the statute required disqualification following its filing. It can be inferred from the affidavit's allegations that Justice Holtzoff was predisposed against the appellant, since an investigator may reasonably be supposed to entertain a prejudice against one whom he has investigated and found guilty of reprehensible conduct. It can not promote public confidence in the judiciary for an investigator to sit in judgment on the person he investigated. By the same token, it is offensive to the policy of the statute for one who has an extreme personal hatred of Communists to judge a Communist. Hatred, like other emotional attitudes, is itself susceptible of proof only by inference, and in this case the inference is fairly supported. One who proposes to deport and incarcerate alien Communists and who admires, supports, cooperates and is friendly with, an official who describes Communists by intemperate, unofficial epithets, may reasonably be supposed to have exhibited a "bent of mind" with respect to Communists.

In *Barsky v. Holtzoff*, U. S. App. D. C., April Term 1947, Misc. 126, decided June 11, 1947, rehearing denied June 12, 1947, the court issued a writ of prohibition compelling Justice Holtzoff to disqualify himself in a prosecution under the same contempt-of-Congress statute. The circumstances recited in Barsky's affidavit with regards to Justice Holtzoff's participation in F. B. I. investigations were the same as alleged by petitioner, except that a different organiza-

tion is involved. The identity of the Eisler and Barsky affidavits on this point was recognized by Justice Holtzoff himself. The Barsky affidavit had been filed after the appellant's affidavit and was stricken by Justice Holtzoff following the same action in the appellant's case. In ruling on the *Barsky* case, Justice Holtzoff stated:

> I refer to my memorandum in the case of United States v. Eisler, in which a similar affidavit was filed, and which I overruled for the same reasons. In my memorandum in that case, I expounded at considerable length the principles to which I have just referred, and stated authorities. I will consider my memorandum in that case incorporated as part of my ruling in this case.

The Court of Appeals had made the Barsky writ absolute by the time this appellant's motion for a new trial was argued. In adhering to his earlier ruling, Justice Holtzoff distinguished the *Barsky* case not on any substantive ground but solely on the basis of asserted formal defects. These are subsequently considered herein.

It thus appears that the majority below refused to follow the ruling its court had made in the *Barsky* case only a few months earlier. The majority, however, did not see fit to mention or distinguish the *Barsky* decision, although the dissenting Justice considered it to be controlling (R. 242, 170 F. (2d) at 282).

The government has made some suggestion in its opposition to the granting of certiorari that the petitioner's affidavit was "argumentative" rather than factual with respect to the assertion of Justice Holtzoff's participation in investigations of the petitioner and others. This suggestion itself runs counter to the policy of the statute since it relies not on any fair reading of the affidavit, but rather on a hypertechnical construction. *Cf. Nations v. United States*, 14 F. (2d) 507, 509: "But we do not think that the affidavit need be so drawn as to fulfill the technical requirements of an indictment." It is apparent from the foregoing that

Justice Holtzoff himself understood that the import of the affidavit was that he had investigated the petitioner; otherwise, he would hardly have taken the trouble to deny the assertion (R. 207, 208). The majority in the Court of Appeals also so understood the affidavit, stating in its opinion (R. 237), "Appellant alleged, upon information and belief, that the judge had, in that prior capacity, directly assisted Federal Bureau of Investigation inquiries into the activities of aliens and Communists, including appellant." The dissenting judge had the same understanding, saying (R. 241), "In sum, the affidavit says that prior to his elevation to the bench the trial judge had been the active legal advisor to the investigator in the very investigation out of which this case arose, which investigation involved this appellant, among others."

Under the circumstances, it does not become the government to attempt to sustain the judgment below by advancing a strained interpretation which had never occurred either to the petitioner or to the two courts below.

While eliminating the embarassment of *Barsky's* precedent by simply ignoring it, the majority below ruled that the affidavit did not establish bias and prejudice "in the personal sense contemplated by the statute" (R. 237). It stated that "impersonal prejudice resulting from a judge's background or experience is not, in our opinion, within the purview of the statute" (*ibid.*). If this statement be taken to mean that prejudice which results from "background or experience" is *ipso facto* impersonal and thus not within the statute, it obviously repeals the statute; all prejudice results from "background or experience," not from heredity. If the statement means something else, it is on the one hand obscure and on the other deficient in explaining why the prejudice charged in this case was "impersonal." The use of the verbalistic formula of "personal" or "impersonal" supplies no guidance for decision. The correct test, in the light of the statutory policy, is whether one of ordi-

nary conscience might well deem it unseemly for a judge to sit in view of the facts alleged in the affidavit. Justice Prettyman, therefore, reached the nub of the case in his dissent (R. 242): "Many able and conscientious lawyers and judges — and the trial judge here involved is certainly both — have a deep and abiding conviction of their own abilities to prosecute impersonally and to judge impersonally, and to do both in the same case. But such psychological detachment is not so well established that a belief to the contrary is unreasonable." *Cf.* sec. 5(c), Administrative Procedure Act, 5 U. S. C. §1004(c), which provides: "No officer, employee or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review. . . ."

The affidavit was also sufficient to require disqualification in its allegations regarding Justice Holtzoff's attitude toward Communists. The gist of these allegations is that Justice Holtzoff has a personal hatred of, and participated with Mr. Hoover in activities directed against, Communists. These were misconstrued by the trial court into a mere allegation that he is a friend of Mr. Hoover, who had made uncomplimentary references to Communists (R. 5).

In the *Berger* case, *supra*, the Supreme Court compelled the disqualification of Judge Landis in a trial of German and German-American defendants upon an affidavit alleging his personal hostility to Germans and German-Americans. The decision is thus controlling authority to require disqualification where, as is the case here, the affidavit of a Communist defendant demonstrates that the judge has a personal hatred of Communists.

A distinction is to be made, in this respect, between an aversion to Communism as a system and a hatred of those who advocate it. The allegations of the affidavit are to

the effect that Justice Holtzoff, like Mr. Hoover and the members of the Committee on Un-American Activities (none of whom could with any seemliness be permitted to sit in judgment on a Communist), has both attitudes.

B. The affidavit was timely.

The disqualification statute requires the affidavit to be filed ten days before the term of court unless good cause be shown for a failure to file within that time. Both the majority and dissenting Justice below agreed that the ten-day portion of this rule is impossible of application in the District of Columbia. The situation is described by Justice Prettyman in the following passage (R. 242, 170 F. (2d) at 283):

> The statute speaks of filing ten days before the term of court, but that provision was designed for district courts which have periodical terms and in which the identity of the trial judge is known well in advance. In this jurisdiction, the District Court consists of twelve judges who serve in rotation, or upon assignment, in the several branches of the court. The court is in continuous session, except for the summer. Thus, the name of the trial judge may not be known until shortly before the trial; as a matter of fact, several different methods of assigning criminal cases for trial have been experimented with in recent years. It is settled that in this jurisdiction the ten day provision of the statute is impractical in application and, instead, the rule of 'due diligence' must be applied. This is permissible under the clause of the statute which excepts from the ten-day requirement cases in which 'good cause shall be shown for the failure to file it within such time.'

As an addendum to Justice Prettyman's statement it should be noted that under the regular procedure in the District Court of the District of Columbia, there is no connection between assignment of hearing of motions before trial and assignment for trial. That is, the trial judge may or may not be the same judge who heard a motion in the case.

The petitioner's counsel, some of whom were in New York City and others in Washington, first learned on May 20, 1947 that the trial of the case had been assigned to Justice Holtzoff. The affidavit of bias and prejudice was filed with the District Court on May 29, 1947. The reason for the interval was explained as follows in the affidavit (R. 225):

> I was first advised on or about May 20, 1947 by my counsel, who had just learned of the fact, that this case was to be tried before Justice Holtzoff. At that time I asked one of my counsel, Abraham J. Isserman, whether I was obliged to go on trial before a judge who had been connected with the F.B.I. and J. Edgar Hoover. He suggested that he would discuuss it with my other counsel in Washington, D. C. on May 23rd. I was subsequently advised that no conference on this question was held on that day because of the sudden death of Mr. Isserman's brother. Mr. Isserman was unavailable because of this bereavement, until May 27th, on which day my counsel conferred. They reported to me on May 28th after which I directed them to prepare this affidavit.

Both the trial court (R. 4) and the appellate court held that the affidavit was filed too late to require disqualification. This holding was erroneous and contrary to the policy of the statute. The lapse of time arose from the sudden death of the brother of the chief trial counsel and the dispersion of counsel and petitioner between two cities.

But even without these circumstances, a lapse of eight days between knowledge of the identity of the presiding judge and filing of the affidavit indicates no absence of diligence, particularly when the filing took place well before the trial date (June 4) and, in view of the availability of other judges, could not have been expected to delay the trial. The filing of such an affidavit is not to be taken lightly by any reputable lawyer. He too has a stake in the preservation of public confidence in our judicial system. He can be disciplined for contempt if his zeal in certifying

and filing the affidavit exceeds his discretion. *Cf. Laughlin v. United States*, 80 App. D. C. 101, 151 F. (2d) 281, cert. denied, 326 U.S. 777. If the affidavit is stricken, he must try his case, and perhaps future cases as well, before an estranged judge. When the client, therefore, suggests action for disqualification, the lawyer must consider the matter carefully. He must examine the client closely and seek independent verification of the client's assertions. Co-counsel must consult, even if they reside in different cities. The affidavit filed in this case shows on its face that research preceded its preparation; see, for example, the references therein to the Congressional Record, to hearings of the House Judiciary Committee, and to a House Report (R. 223, 224).

That it is proper for counsel to delay filing an affidavit of prejudice until he is sure of his ground has been recognized by the Eighth Circuit in *Morris v. United States*, 26 F. (2d) 444, which, in holding an affidavit to have been timely filed, regarded only the lapse of time after the hesitant attorney had received more convincing evidence of his client's assertions than had previously been at hand.

By imposing unreasonable conditions of time the holding not only frustrates the statutory policy to protect litigants from unfair trial and to preserve the reputation of the judiciary but also tends to cause an abuse of the statute. Justice Prettyman's dissenting opinion, we submit, states the rule which should have been followed (R. 243, 170 F. (2d) at 283):

> It seems to me that under the foregoing circumstances the filing of the affidavit nine days after the identity of the trial judge was ascertained came within 'due diligence'. There was an unforeseeable and unavoidable interruption during those nine days. The affidavit was filed six days before the trial, and other judges were available so that the trial would not have been delayed. Affiant could well have known that with twelve active judges on this District Court, no delay in trial would result from the disqualification of one

of them. Moreover, these affidavits should be prepared with the utmost care and certainty as to the facts. The courts should encourage careful consideration and deliberation on the part of counsel. It seems to me to be a grave mistake to hold that such affidavits must be filed almost instantaneously after the identity of the trial judge is ascertained. Such a rule will almost make mandatory the filing of the affidavit without deliberate and careful consideration of counsel. The rule ought to be that they be filed with the utmost deliberation consistent with the undelayed dispatch of the business of the court.

It is immaterial that motions to dismiss the indictment and for particulars were heard and denied by Justice Holtzoff on May 23, 1947 (R. 221). That date was a scant three days after Justice Holtzoff's assignment was learned of, and was the day on which the conference of petitioner's attorneys, scheduled to discuss filing the affidavit, was disrupted by the death of counsel's brother. Counsel could not fairly be expected to move for Justice Holtzoff's disqualification when there had been so inadequate an opportunity to examine the facts, the law, and the policy considerations. Furthermore, different considerations obviously apply as between the making of decision on a bare motion and the presiding at a trial before a jury. In *Barsky's* case, *supra*, the affidavit of bias and prejudice was not filed until after Justice Holtzoff had denied motions to dismiss the indictment; nevertheless, the District of Columbia Court of Appeals issued the writ of prohibition.

C. The affidavit was sufficient in form.

A comparison of the affidavit with the terms of the statute shows a scrupulous conformance to the formal requirements. However, one of the reasons assigned by Justice Holtzoff for striking the affidavit is an asserted defect in form in that the certificate of good faith was signed by Carol King, who, he stated, was not counsel of record for the defendant (R. 5), as required by the statute.

This assumption was palpably erroneous. Mrs. King was counsel of record beyond dispute, and the prosecution so stipulates (R. 229, 230). She was admitted *pro hac vice* by Mr. Chief Justice Laws at the arraignment (R. 215, 229). (Justice Holtzoff's statement in his opinion on the motion for new trial that he admitted Carol King pro hac vice (R. 206) is erroneous):

In the opinion on the motion for new trial, the trial court abandoned its error of fact and relied instead on the circumstance that Carol King is not a member of the District of Columbia bar (R. 206, 207).

To require that the certificate of good faith be signed by a counsel of record who is also a member of the local bar is a judicial amendment of the statute wholly unsupported by any statutory language, legislative history or court decisions.

D. The affiant's good faith could not be questioned.

As an additional ground for striking the affidavit, the trial court below stated that the affidavit was not filed in good faith (R. 4). In making such a finding, the court added still another requirement to the plain language of the statute. The statute requires that the affidavit be "accompanied by a certificate of counsel of record that such affidavit and application are made in good faith." This requirement of the statute, as we have shown above, was fully met. The statute does not permit the trial court to go beyond this requirement and to inquire as to whether the affiant did or did not have good faith. *Morris* v. *United States*, 26 F. (2d) 444.

To permit the trial court to go outside the affidavit in order to rebut the affiant's good faith, would be nothing more than an evasion of the doctrine of the *Berger* and *Barsky* cases, *supra*, that the trial court may not review the facts in the affidavit. The legislative requirement of a good faith certification by counsel was designed to elimi-

nate this problem. In the *Berger* case, the Court said that to permit the judge charged with partiality to pass on the facts would simply perpetrate the very evil against which the statute is directed. The identical reasoning would forbid the trial court to go outside the affidavit and make findings as to the affiant's good faith. Indeed, the latter situation is more extreme. For how can the trial court rule on the affiant's motivation without a hearing? And in what manner can the affiant, if he wishes, dispute the findings of the court if they are based on facts outside the record?[7]

E. Conclusion.

We urge the Court to reaffirm the policy of the statute and the doctrine of the *Berger* case that the statute's "solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial" (at 35, 36). To the argument that to permit disqualification of judges upon the mere filing of affidavits would lead to abuses, the Court answered as follows (*Berger* case at 35):

> And in this there is no serious detriment to the administration of justice, nor inconvenience worthy of mention; for of what concern is it to a judge to preside in a particular case? of what concern to other parties to have him so preside?

There are twelve justices in the District Court for the District of Columbia. If Justice Holtzoff had excused himself another justice could have been assigned, the policy of the statute effectuated and no injury done to the administration of justice. The decision below is illustrative of a tendency in the lower courts to apply the statute

[7] In the present proceeding, the trial court referred to certain occurrences in chambers (R. 4, 206). Counsel's recollection of this incident does not conform with that stated by the court. We submit that the injection of such factual issues will not promote the policy of the statute or the administration of justice. Further, none of the facts recited by the court would appear to warrant its conclusion of bad faith.

narrowly and technically, thus nullifying its purpose as expounded in the *Berger* case, *supra*. See Frank, *Disqualification of Judges*, 56 Yale L. J. 605, 629. This Court should determine that this important statute, enacted to preserve respect for and confidence in the courts and to protect litigants from possibly biased judges, should receive a fair and liberal interpretation rather than the negative and grudging one applied in this case.

V. The Petitioner Did Not Receive a Fair Trial, and the Trial Court Virtually Directed a Verdict of Guilty.

The trial court's manifested hostility was so pervasive in nature that it cannot be fully appreciated without a review of the entire record. The following points up only some of the more glaring instances of bias. It is appropriate to note that the trial lasted only a few days. Thus the effect of the court's actions was not dissipated in the course of a long trial, nor does partial justification arise from possible weariness.

A. Prohibiting or allowing objections before the witness completed his answer.

The trial court made clear to defense counsel that a government witness, under cross-examination or otherwise, was to be allowed to finish his answer before any objection by defense counsel would be entertained.

Thus defense counsel was not permitted by the Court to object to the testimony of the witness although it was clear that the witness was speculating (R. 14, 15); that the witness had completed his answer but was about to add additional matter not called for by the question (R. 21); that the witness was addressing remarks to the Court instead of answering a simple question on cross-examination (R. 39); or that the witness' response was going far beyond the scope of the question (R. 42-45).

In sharp contrast, the court did not apply its announced rule so as to prevent the prosecution from interrupting a witness' answer. Examples appear in the record at pages 99, 113, 122, 124. The following is illustrative (R. 122):

> Q. [By Mr. Isserman] Did counsel advise you as to these rights?
>
> A. [By the defendant] Yes, counsel advised me—
>
> Mr. Hitz: I am sorry, you have answered the question.
>
> The Court: Just answer yes or no.

Not only did the court permit Government counsel to interrupt a witness before his answer was complete, but the court, contrary to the rules laid down for defense counsel, itself on a number of occasions interrupted the defendant, when he was on the stand, before he had finished his answer, and prevented its completion (R. 114, 117, 129, 143).

The following examples are illustrative:

> Q. [By Mr. Isserman]: Mr. Thomas has testified at this trial, Mr. Eisler, that after you were asked to take the stand you said, 'I am not going to take the stand', and I ask you now whether you made that statement?
>
> A. [By the defendant]: Yes, it was the first part of the statement which I was not able to answer because I was interrupted.
>
> Q. What was the second part?
>
> A. I wanted to say—
>
> The Court: No, you have answered the question. (R. 129).

> Q. [By Mr. Isserman]: Did you have any other papers?
>
> A. [By the defendant]: Yes, I had a Mexican substitute passport, because I was invited—
>
> The Court: Just a minute, you have answered the question. (R. 114).

Thus the no-interruption rule was applied only to the defense and not to the prosecution or the court.

B. Reprimanding and harassing defense counsel.

(a) Defense counsel was cross examining Stripling, Chief Investigator of the House Committee on Un-American Activities, as to the hearing on February 6, 1947 at which Eisler committed the alleged contempt. Counsel was trying to show that Eisler actually took the witness chair, a point on which the witness had been evasive. The following took place (R. 33, 34, 35):

> Q. [By Mr. Isserman]: Isn't it true that Mr. Eisler sat down in the chair reserved for witnesses at the very beginning of the hearing?
>
> A. [By Mr. Stripling]: I don't recall that he did, no.
>
> Q. Well, do you have any recollection as to when Mr. Eisler took the witness stand?
>
> A. It is my recollection that he sat down when the Chairman made his preliminary remarks—while he was reading his preliminary remarks.
>
> Q. So that it was shortly after Mr. Eisler stated, according to your testimony, 'I am not going to take the stand,' that he actually sat down in the witness chair; isn't that true?
>
> A. I don't recall exactly whether he sat down or whether he stood.
>
> The Court: I think that is minutiae and is immaterial, because the charge against the defendant is that he declined to take the oath. What chair he was sitting in or whether he was seated or standing is, I think, immaterial. I suggest to counsel that the interrogation be directed to the charge in the indictment.
>
> Mr. Isserman: Well—
>
> The Court: Do not argue. I made a suggestion. Proceed to the next question.
>
> Mr. Isserman: I would like to have an answer to the question I just put.
>
> The Reporter (reading): 'Question: So that it was shortly after Mr. Eisler stated, according to your testimony, "I am not going to take the stand," that he actually sat down in the witness chair; isn't that true?'
>
> By the Court:
>
> Q. If you don't remember, say you don't remember.

A. I don't remember.

By Mr. Isserman:

Q. Do you remember that he sat down in the chair at all, Mr. Stripling?

A. I am not positive whether he sat down or not.

Q. Just a few minutes ago you said Mr. Eisler walked over to the table and sat down in a chair reserved for witnesses. Now, did he or did he not do that?

The Court: You have the record; do not repeat the same question.

Mr. Isserman: That is not in the record. This is a matter outside the record.

The Court: I mean it is already in the record of what this witness testified this afternoon. You are repeating the same question.

Mr. Isserman: It is not clear to counsel. The witness has contradicted himself.

The Court: The question is in the record. Now, proceed to another question.

Mr. Isserman: I would like to resolve the contradiction by continuing questioning on this point.

The Court: Ask a specific question with a view to resolving the contradiction if you wish. You may do that.

This passage does not merely illustrate reprimands to counsel in which the court admonishes him not to "argue" and not to "repeat" what the court designates as "the same question." It illustrates, as well, the court's interference with cross examination. The court also by its reference to "minutiae" minimized the possible effect or value of cross-examination.

For a similar reference to "minutiae", see R. 84.

(b) When defense counsel moved to strike a remark made by the witness Thomas, the following occurred (R. 42):

Mr. Isserman: I ask that that remark be stricken as not being responsive.

The Court: It may be stricken. Just state your motion; do not argue.

Mr. Isserman: I have not argued; I just stated my ground.

(c) A few minutes later, the court again rebuked defense counsel. The following took place (R. 45-46):

Mr. Isserman: Have you read all the questions and answers which deal with Mr. Eisler's refusal to be sworn?

Mr. Thomas: Up to that point. I shall be glad to continue.

Mr. Isserman: Just a moment; you will get an opportunity to continue.

The Court: Do not argue with the witness.

Mr. Isserman: Well, the witness was remonstrating with counsel. I ask that he be admonished to answer the question.

The Court: I suggest to counsel that he proceed as counsel should.

Mr. Isserman: I wish to make objection to your Honor's remark and ask that it be stricken.

The Court: Motion denied. Counsel's function on cross-examination of a witness is solely to ask questions and not to remonstrate with the witness. Now, proceed and ask the next question.

If the court had not intervened—and there certainly was no occasion for it—the cross-examination would have proceeded without incident. But taking advantage of a triviality, the court managed to rebuke counsel twice.

(d) Subsequently the court at the bench delivered a most severe rebuke to defense counsel. Defense counsel was cross-examining Congressman Thomas when the following occurred (R. 50-51):

Q. [By Mr. Isserman] Now, Mr. Thomas, you say that the attorney for Mr. Eisler, Mrs. King, who is sitting at counsel table, made no effort to state any objection; is that your best recollection?

A. [By Mr. Thomas] There is one sentence in this testimony which indicates the only time that Mrs. King made any effort to do anything other than give out a lot of papers.

Q. Just a minute. That sentence was addressed to you by Mrs. King, was it not?

Mr. Hitz [Government attorney]: What sentence are you talking about?

Mr. Isserman: The sentence the witness has just referred to. He knows what sentence I am talking about.

The Court: Let us not have any colloquy.

Mr. Isserman: Well, I would like to get an answer from the witness.

The Court: Will counsel come to the bench, please?

Counsel, as the court directed, then approached the bench, and the following occurred (R. 51, 52):

The Court: Mr. Isserman, the Court appreciates the fact that you are from out of town. I do not know what the practice is in your jurisdiction, but in this court the custom is for counsel to be urbane, courteous, and civil, and not to speak abruptly or opprobriously.

Mr. Isserman: I want to object to your Honor's remark and ask that it be stricken from this record, because there is no basis for it.

The Court: *I did you the courtesy of saying this at a bench conference, so that the jury should not hear my remarks; but you do not take them in the spirit in which they are intended. If you are not going to be urbane and courteous, I shall the next time I have to call attention to the fact do it in the presence of the jury.* [Emphasis added.]

Mr. Isserman: Will your Honor hear me?

The Court: No.

Mr. Isserman: I move that your Honor's remarks be stricken, as indicating nothing that has happened in this courtroom. I think counsel should be allowed leeway in cross-examination.

The Court: They are allowed leeway, but they must always be within the bounds of courtesy.

Mr. Isserman: I believe I have observed those bounds.

The Court: No, you have not, particularly in the way you addressed the Court. Abruptness is not permitted. No local counsel ever departs from an urbane, courteous manner to the Court.

Mr. Isserman: I will try to be courteous and urbane in my remarks.

The Court: I am trying to help counsel, because if you were a member of this bar and you acted like that, the consequences would be much more severe. However, I know that perhaps—well, I do not know what the custom is where you practice, so I want to give you the advantage of a warning in advance.

The italicized portion of the foregoing is a threat which, as we shall see, was subsequently fulfilled. The excerpt also reveals a hostility to counsel because he was "from out-of-town," and the court's recognition of the effect on the jury of the court's previous rebukes of counsel in the jury's presence.

(e) On a simple matter of identifying a telegram, the court by its intervention made difficulties for defense counsel and treated counsel in a brusque manner which was bound to influence the jury. Counsel was trying to indicate by whom a telegram was signed (R. 91, 92).

Mr. Isserman: May I have the telegram dated April 12, 1947, addressed to the Honorable John F. McGohey, United States District Attorney, U. S. Court House, New York, signed—

The Court: Don't go into all those details.

Mr. Isserman: I want to identify the telegram.

The Court: Just identify it briefly.

Mr. Isserman: I am going to give the—

The Court: Don't tell me that, just identify it briefly.

Mr. Isserman: I am trying to do as Your Honor tells me.

The Court: The Court has the last word.

Mr. Isserman: I shall complete the identification by indicating that it is signed by Tom C. Clark, Attorney General.

(f) Several examples of the Court's impatience and intemperance in dealing with defense counsel appears from the following (R. 95-96):

Q. [By Mr. Isserman] Mr. McInerney, I now ask you whether or not Defendant Gerhart Eisler from his arrival in the United States in June, 1941, applied for

any change of status from his status as to being there on a transit visa, up to and including February 4, 1947?

Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: I offer to prove that this witness, if allowed to answer, would state that the defendant Gerhart Eisler never applied for change in status.

The Court: Well, you mean you expect him to say no. That is the offer of proof.

Mr. Isserman: No.

The Court: Because your question calls for a yes or no answer.

Mr. Isserman: May I have the question read, please?

The Court: No, you may proceed.

Mr. Isserman: Well, Your Honor, I would like to—

The Court: You ought to know how to make an offer of proof.

Mr. Isserman: I am asking the stenographer to tell me what I asked. I want to make sure the defendant's point is covered.

The Court: You may do it this time but don't do it again. You ought to know your own question.

Mr. Isserman: May I object to the Court's remark? I think it is improper and I ask that it be stricken out.

The Court: The Court never strikes its own remarks. You may object to the Court's remarks, but the Court never strikes its own remarks.

Mr. Isserman: I ask to have the Court's remark eliminated from the record.

Would you read the question?

(Pending question read by the reporter.)

The Court: You see, that calls for a yes or no answer.

Mr. Isserman: No, it doesn't, it calls for it in the alternative, and I would like to state an offer to prove.

The Court: State it.

Mr. Isserman: I offer to prove that this witness, if allowed to answer, would answer that the defendant, Gerhart Eisler, did not apply for a change in status from the status of an alien in transit to Mexico from the time of his entry in the United States in June, 1941, up to and including February 6, 1947.

The Court: I still say the question calls for a yes or no answer. I think you are wasting time unnecessarily and I sustain the objection.

Mr. Isserman: I am constrained to enter another objection to Your Honor's statement.

The Court: Very well, you have the privilege of doing so.

Thus several pages of display of feeling by the court against defense counsel are hinged upon the court's definite misconception, persisted in, that the "whether-or-not" question asked of Mr. McInerney was capable of being answered "yes" or "no". Although the colloquy was precipitated by the court's unnecessary criticism of the offer of proof, which had not been objected to, the court ended by criticizing defense counsel for wasting time. In the short passage quoted, the court rebuked counsel for not knowing how to make an offer of proof; refused at first to allow the reporter to re-read the question, then permitted it, but only with a warning that defense counsel should not again request the reporter to do so; and charged defense counsel with "wasting time unnecessarily." Moreover, when these remarks of the court were asked to be stricken from the record, the court replied that while counsel might object, "The Court never strikes its own remarks." (*Cf.* 9 *Cyc. of Fed. Procedure* 486-7 to the effect that an error in a remark made by a court "ordinarily is cured by the act of the judge in withdrawing it and ordering it stricken out.")

(g) At the close of one of the trial days, defense counsel indicated, after stating that he had completed the direct examination of the defendant Eisler, that he would have "one or two additional questions" to ask of Mr. Eisler when the court reconvened and would not like to be precluded from doing so. The court stated that he would not be precluded. At the beginning of the next day, when defense counsel was directed to proceed, the following occurred (R. 136):

The Court: You may proceed.

Mr. Isserman: If the Court please, I had reserved the right to ask the defendant a few more questions. I should like to do so at this time.

The Court: You do not reserve the right; the Court will grant that privilege in its discretion.

Mr. Isserman: I mentioned it at the close of the session yesterday.

The Court: You may proceed.

Even this simple matter became a subject of rebuke to defense counsel.

(h) When the court sustained a defense objection that no foundation had been laid for introduction of a document offered by the prosecution, the court, although recognizing the legal soundness of the objection, nevertheless implied in the jury's hearing that defense counsel was being technical and was obstructing the trial in that the transcript, if it were in evidence, "would be helpful" and that "the objection, even if sustained, does not amount to anything." (R. 54).

(i) At one stage of the trial (R. 102-104), defense counsel, because of complaint by the petitioner that there had been too many bench conferences out of his hearing and that he could not keep abreast of the course of the trial, requested the court to allow petitioner to be present at bench conferences or that the conferences occur not at the bench and that whenever necessary the jury be excluded from the court room. The court refused to allow petitioner to approach the bench, but stated that it would permit defense counsel to have such conferences in open court except for "some offers of proof" which it would not permit to be made in open court. Subsequently the court refused to allow defense counsel to make certain offers of proof, including, as one of the grounds, that the court would not permit such offers of proof in open court (R. 108, 109). Thereafter, defense counsel offered to approach the bench to make such offers of proof. In the presence of the jury, the court refused in the following manner (R. 109):

The Court: No; in the light of the statement made by defense counsel I will not allow that. You stated at the last bench conference that you preferred everything done in open court; that your client objected to having things done at the bench that he could not hear. I informed you that the only purpose of a bench conference is to protect the defendant. Now, you may not change back and forth.

Mr. Isserman: I am not trying to change, if Your Honor please, but I believe an offer of proof is necessary in this case, and if we cannot make it in open court, we should like to make it at the bench, although I believe—

The Court: Proceed with the next question. . . .

The court, then, was punishing the petitioner because of the position defense counsel had taken on the question of bench conferences, and the court's comments, made in the jury's presence, were harmful to the petitioner.

(j) The court, at a subsequent time, did allow the defense counsel to make an offer of proof at the bench on a most important point, but only after a colloquy which had harmful effect on the jury. When the court finally did allow it to be made, the court was impatient with counsel and sought unduly to curtail counsel's offer, as the following shows (R. 133-135):

Mr. Isserman: Now, will you tell us what you intended to say to the House Committee on Un-American Activities in the three minutes you asked for before being sworn?

Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: May I make an offer of proof?

The Court: No, it is not necessary; I consider that irrelevant.

Mr. Isserman: I believe if your Honor would hear my offer of proof it would not be irrelevant. I believe your Honor would so consider it.

The Court: Ordinarily I do not permit offers of proof before the jury because that is an indirect way of getting testimony in before the jury after the Court

has excluded it. Moreover, I consider the subject matter irrelevant.

Mr. Isserman: I am perfectly willing to make the offer of proof at the bench if your Honor will allow us to make it there.

The Court: You may come to the bench.

(Counsel for both sides approached the bench, and the following occurred:)

The Court: Make it very brief. Do not take *the full three minutes;* make it very brief. [Emphasis added.]

Mr. Isserman: The defendant, if allowed to answer this question, would state that he would have made the following remarks: "I am a political prisoner"—

The Court: No, I am not going to allow you to read the whole statement. What is the general import?

Mr. Isserman: To the Committee causing his illegal arrest because the illegal arrest was procured by Mr. Thomas and members of the House Committee on Un-American Activities; that the purpose of the arrest was for no purpose within the scope and power of the House Committee on Un-American Activities.

The Court: I think you have given me enough to give—

Mr. Isserman: If you will hear me.

The Court: Make it very brief.

Mr. Isserman: I am trying to make it very brief; that he had no opportunity for full consultation with his counsel; that he was going to ask for an adjournment until the matter of his arrest had been cleared up, and that the purpose of subpoenaing him had no relevancy to any matter within the powers of the Committee; that the Committee had called him because of his political views, and to prevent his departure to Germany.

C. Undue intervention in examination and cross-examination.

It has already been indicated that in the course of reprimanding defense counsel the court interfered substantially with the progress of the examination and cross-examina-

tion. Additional incidents of this prejudicial conduct are found in the record.

(a) At the most crucial portion of the petitioner's direct examination, the court intervened in a manner bound to give the jury the impression that the petitioner was guilty (R. 131, 132):

> Q. [By Mr. Isserman] Mr. Eisler, on February 6, 1947, when you were present before the House Committee on Un-American Activities did you at any time refuse to be sworn?
>
> A. [By the defendant] No; I made repeated efforts to be sworn in.
>
> By the Court:
>
> Q. When you say you made repeated efforts to be sworn you mean you made offers to be sworn on condition—
>
> A. (Interposing) Yes.
>
> The Court: (Continuing)—that first you be given an opportunity to speak?
>
> A. Correct.
>
> Q. You did not make any unconditional offer to be sworn, did you?
>
> A. It was conditioned if I would be allowed three minutes to speak I would unconditionally take the oath.
>
> By Mr. Isserman:
>
> Q. And did you tell the members of that Committee and the Chairman how long a period you desired in which to make a few remarks?
>
> A. Many times; exactly three minutes.

The Government attorney would not have been allowed to interpose these questions in the course of direct examination of the petitioner, as the court did. The court certainly did not act impartially when it addressed a leading question to the petitioner and characterized his effort to make objections to the Committee proceedings before being sworn as a "condition" imposed by the petitioner on the Committee's procedure.

(b) The petitioner was explaining under cross-examination that if the hearing before the Committee had proceeded

he would have answered those questions which he believed to be relevant. The court intervened as follows (R. 143):

By the Court:

Q. You mean you would have made yourself the judge?

A. [By the petitioner] By no means, Mr. Judge. If the Committee would have told me, 'Certain parts of your biography are relevant,' and would have convinced me they are relevant, I would have given them also parts of my biography.

Thus an unfavorable impression was created before the jury, even though both government counsel and court knew that the petitioner's obligations at the hearing before the Committee, had he been properly called and sworn to testify, would have been to answer only *pertinent* questions. Further, defense counsel, on redirect examination, was not permitted to clarify this point before the jury. (R. 146, and see D, post).

(c) The court assumed the prosecutor's role by a vigorous cross examination of the petitioner, which closed the government attorney's cross examination (R. 143).

Q. [By Mr. Hitz] You never took the oath to testify, did you, Mr. Eisler?

A. [By petitioner] I was prevented to take the oath by illegal proceedings of the Committee.

Q. You did not take the oath, did you?

By the Court:

Q. Answer yes or no.

A. I couldn't take the oath.

Q. Answer yes or no. Did you take the oath?

A. No, I didn't take the oath.

Mr. Hitz: No further questions.

(d) In the course of the trial and in the presence of the jury, and excluding rulings at bench conferences, the court ruled on 52 objections made by government counsel. At the same time, the court on its own motion, without intervention of government counsel, made 34 objections directed

to the defense.[8] Under these circumstances, the jury could not but be convinced that the court was largely conducting the prosecution.

D. Inconsistent rulings on evidence.

The court made inconsistent rulings on questions of evidence favorable to the prosecution and prejudicial to the petitioner as follows:

(a) The prosecution was permitted to show that petitioner had counsel present (R. 27), and to argue that if legal objections were to be made, counsel was to make them (R. 49, 165); but the defense was not allowed to show that the committee practice was not to permit counsel to speak (R. 107, 150), and that counsel had accordingly instructed petitioner to make his own legal objection (R. 146, 149, 150).[9]

(b) The defense counsel was not permitted to introduce evidence as to what the petitioner wished to say before the Committee (R. 133-135), but the prosecution was permitted to argue, over objection, its version of what the petitioner intended to say (R. 166-168).

(c) The defense was not allowed to show that petitioner would have answered questions if permitted to make a three minute objection (R. 121, 135), but the prosecution was permitted to show that the petitioner would not have answered questions (R. 140-147). Indeed, the court even assisted the prosecution in this examination (R. 140-145). But when the defense attempted to clarify what was obviously a damaging

[8] *Objections by prosecution*: Tr. 71, R. 49, 58, 59, 89, 92, 93, 94, 95, 96, 97(2), 98, 99, 100, 101, 106, Tr. 271, R. 108, 109, 110, 113, 115(2), 116(2), 117(2), 118(2), 119, 120, 121(2), 122, 123(2), 124(2), 125(2), 126, 128, 133, 134, 135(2), 138(3), 149(2). *Objections by the Court*: R. 34(2), 37(2), 38, 42, 58, 79, 82, 84, Tr. 204, 206, R. 86(2), 87, Tr. 214, R. 89(2), 94, 106, 107, 127, 128, 130-131, 132, 133, 138, 140, 145, 146(3), 160, 162.

[9] It should be noted that the majority opinion of the appellate court considered it "important to note that appellant was accompanied to the hearing by his legal counsel" (R. 239). The majority opinion, however, did not comment on the inconsistent rulings of the trial court on this question, although the point was briefed and argued before the court below.

impression before the jury, the court refused to allow the petitioner to explain that he would, as was his right, have declined to answer questions beyond the Committee's authority while answering pertinent questions (R. 146, 147).

E. Direction of a verdict of guilty.

The position of the prosecution was that the petitioner had refused to be sworn except on his own conditions. The position of the defense was that the petitioner had not made such a qualified refusal, but had merely attempted to state a legal objection to being sworn—as was his right (R. 69, 73, 77-78). This raised an issue for the jury. The court, however, refused to give requested charges which would have submitted this issue to the jury (R. 180, requested charges 17, 18, 19, 20, 21). Instead, its charge at once found that there had been a refusal to take the oath and mis-stated the defense position. The court stated in its charge (R. 173):

> In this case it appears that the defendant was requested by the Chairman to take the oath several times, *but on each occasion the defendant either refused categorically or refused except on certain conditions, that he specified* . . .
>
> As I understand it, *the defendant contends that he wanted an opportunity to make a statement concerning his arrest before he was sworn.* The law is that a witness does not have the legal right to dictate the conditions on which he will or will not take the oath as a witness, or the conditions on which he will or will not testify. [Emphasis added.]

When the court's attention was called to the misstatement of the defense position, apparent in the second paragraph of the above excerpt, it agreed to supplement the charge (but only after the prosecuting attorney had joined in the defense request for clarification) (R. 175, 176). The supplemental charge was as follows (R. 177):

> Ladies and gentlemen: I am going to expand one little statement that I made to you. I have stated that

the defendant contends that he wanted an opportuniy to make a statement concerning his arrest. In order that there may be no ambiguity, I am going to read to you what the defendant said on the witness stand concerning this matter. . . .

He was asked: 'Why did you ask the committee for 3 minutes to make some remarks before you would be sworn on the morning of February 6?'

His answer was on this witness stand: 'Because I had objection against the whole, what I considered unlawful proceedings of this committee against my person.' This states his contenfion in his own words; *but I want to repeat again that a witness does not have the legal right to dictate the conditions on which he will or will not testify, or to insist on making a statement as a condition of taking the oath as a witness.* [Emphasis supplied.]

It is apparent that the portion italicized in this excerpt effectively nullified any correction made by the court in its statement of the defense position. But even were this not the case, the supplemental charge did not in any manner cure the error of the court's *finding* (first paragraph of preceding excerpt) that the appellant had refused to take the oath. This issue was in contest, and the jury had to find it to return a verdict of guilty, whether or not the defense position was accurately stated.

This finding of fact by the court, coupled with the instruction that the appellant could not lawfully condition his willingness to take the oath, removed from the jury the major issue of fact and was a direction of a verdict of guilty. The misstatement of the defense position further aggravated the situation. On this basis alone the judgment below must be reversed. *Cf. Weiler v. United States*, 323 U. S. 606; *Bollenbach v. United States*, 326 U. S. 607.

F. Refusal to permit defense counsel to object to court's charge out of the hearing of the jury.

A further instance of prejudice was the trial court's conduct in preventing defense counsel from objecting to its

supplemental charge out of the hearing of the jury, despite counsel's express request for leave to approach the be[illegible] (R. 177).

Rule 30 of the Rules of Criminal Procedure provides in part:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection. *Opportunity shall be given to make the objection out of the hearing of the jury.* [Emphasis supplied.]

The purpose of the italicized sentence is obvious: to withhold from the jury knowledge of what portions of the charge counsel considers detrimental to his case. The court's violation of this clear rule and its purpose is, in addition to evidence of bias, an independent ground for reversal.

G. Comments at the hearing on the motion for new trial.

(a) Certain remarks made by the court at the hearing on the motion for new trial are unusually revealing. The following colloquy took place (R. 190):

> Mr. Isserman: ... We say that there is no circumstance, as far as we understand the cases, in which a defendant can be punished before the jury by rebuking his counsel in the jury's presence.
>
> The Court: If counsel oversteps the bounds, I think the Court has a right to check counsel. *It is unfortunate that the defendant suffers.* But in this particular case the Court took care to explain to counsel at the bench conference the type of conduct and the type of manner that was expected. [Emphasis added.]

This exchange, coupled with the bench colloquy described in section B(d), *supra*, shows that the court was fully aware that its reprimands of counsel before the jury injured the petitioner. It also shows that the court realized that it had threatened to make the petitioner suffer for alleged (and,

we assert, non-existent) misconduct of defense counsel, and that it had carried out the threat.

(b) The court itself admitted that it had no feeling that counsel intended to be discourteous (R. 190), that the record did not divulge provocative conduct by counsel, and that the alleged misconduct merely "involved brusqueness of tone and matters of that kind" (R. 191).

(c) Throughout the hearing on the motion the court displayed impatience. Thus when counsel referred to the Canons of Judicial Ethics, the court stated (R. 198):

> I suggest that you confine yourself to the law and not tell me that the Court violated judicial ethics. I think the Court is a better judge of that.

The court also remarked (R. 201):

> You gentlemen have taken almost three-quarters of an hour on this motion for a new trial. That is longer than we ordinarily give to motions for new trials.

For other manifestations of impatience, see R. 186, 191, 195, 198, 199, 200, 202, 203.

H. Concluding analysis.

When an American judge exhibits bias and unfairness in a case before him, he injures one of the most cherished of our institutions. When his prejudice is directed against an alien dissident, such as the petitioner here, the injury is aggravated, for then, as in the Sacco-Vanzetti case, there is published to the world our domestic shame. The judge is, therefore, held to a high and unyielding standard in the execution of his oath of office. The first of the Canons of Judicial Ethics of the American Bar Association calls on the judge to be courteous to counsel. The fifth canon requires that he be "temperate, attentive, patient, impartial." So important to the judiciary is the preservation of public confidence and respect that the judge must not only *be* impartial, he must *appear* impartial as well. *Whit-*

aker v. McLean, 73 App. D. C. 259, 118 F. (2d) 596. "The trial judge should be so impartial, in the trial of a criminal case, that by no word or act of his may the jury be able to detect his personal convictions as to the guilt or innocence of the accused." *Egan v. United States*, 52 App. D. C. 384, 397, 287 Fed. 958, 971.

The demonstration on appeal of trial court bias is customarily difficult, particularly when the bias is pervasive rather than exhibited in exaggerated outbursts. It is not often that, as in the *Whitaker* case, a judge uses a foul epithet in court. The record on appeal cannot convey the hostile tones of voice and attitudes, or the titters from the jury box, or the electrified atmosphere of the trial room. These intangibles existed in the trial of this case to an almost unbelievable degree, but they can be reconstructed on appeal only through the unsatisfactory medium of inference from a cold record. But the cold record here, we submit, is alone convincing that the trial court exhibited an active bias, hostility and prejudice toward the petitioner throughout the trial and in the sentencing. The trial judge was, when measured by the canons' requirements, discourteous to counsel, intemperate, inattentive, impatient, partial. He was not impartial and did not appear to be impartial. He discriminated in his treatment of the defense and the prosecution. He applied restrictive rules to the defense alone. He exacted retribution for fancied slights, as in refusing to entertain offers of proof. Under the guise of expediting the trial (which was short in any case), he prolonged it by unnecessary harassing of counsel and petty bickering. He rebuked and ridiculed defense counsel without cause. He minimized defense evidence. His inconsistencies in ruling on admissibility of evidence were adverse to the defense. In his raising of objections and in his cross examination of the petitioner he came close to conducting the prosecution. In his charge to the jury he directed a verdict of guilty, after misstating the defense position, by himself finding, and refusing to submit to the

jury, the only factual matter at issue. Worst of all, this misconduct seems to have been, to some extent at least, intended. The record shows that the trial judge realized the effect his rebukes would have on the jury; he threatened defense counsel to that effect, and, after carrying out his threat, justified his action on the grounds that a defendant must suffer for his attorney's supposed lack of urbanity.

This conduct on the part of the trial judge deprived the petitioner of the fair trial which is his constitutional right. The court's expressions in the jury's presence cannot but have influenced the jury deeply. *Starr v. United States*, 153 U. S. 614, 626. The petitioner was thereby and by the court's charge deprived of his Constitutional right to trial by jury. The court's derogatory comments on defense evidence exceeded the permissible bounds of judicial comment, and invaded the province of the jury. *Starr v. United States, supra*, at 624, 625. Its excessive participation in the examination of defense witnesses, particularly in cross examining the petitioner and in making objections, was prejudicial error. *Adler v. United States*, 182 Fed. 464; *Martucci v. Brooklyn Children's Aid Society*, 140 F. (2d) 732; *Williams v. United States*, 93 F. (2d) 685.

The trial court justified some of its actions on the basis that defense counsel was provocative. This we deny; and the court itself conceded that the record does not reveal as much. But even were such the case, it would not remedy the error. See *Lambert v. United States*, 101 F. (2d) 960 (C. C. A. 5th), holding that though prejudicial argument between court and counsel resulted from the fault of counsel it was nevertheless ground for reversal. *Cf. Commonwealth v. Stallone*, 281 Pa. 41, 126 Atl. 56, in which the court reversed for a display of feeling by the trial court, stating that it did not matter whether the court or counsel was responsible for the situation.

The court below concluded in the face of a record to the contrary that the trial court merely properly confined the trial to the pertinent issues (R. 240, 170 F. (2d) at 281). It ignored completely, among other things, the trial court's recognition that his rebukes to counsel would and did influence the jury, the inconsistent rulings made by the trial court, its numerous manifestations of impatience, its violation of Rule 30 of the Rules of Criminal Procedure, and the fact that its charge amounted to a direction of a verdict of guilty. Various of these omissions were called to the appellate court's attention by the petition for rehearing (R. 249, points 6, 7 and 8), which was denied without comment (R. 250).

VI. The Court Below Erroneously Interpreted "Willfully" in the Statute.

The contempt statute, of course, punishes a default in appearance only if made "willfully." The trial court charged the jury that the term "willful" required only that the default be intentional as distinguished from accidental or inadvertent, and that it did not require bad faith or a bad purpose (R. 172). The appellate court decision, in sustaining the trial court in this interpretation, is at variance with decisions of this Court and the legislation's purpose.

United States v. Murdock, 290 U. S. 389, involved a prosecution for the misdemeanor of willfully refusing to supply certain information to the Bureau of Internal Revenue under the 1926 Revenue Act. The Court held that the defendant had been entitled to a charge making his good faith and belief relevant to the issue of the willfulness of his refusal. The Court stated (at pp. 397-398): "The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense."

In the *Murdock* case, as in this, the offense charged was only a misdemeanor. In both cases the offense is a refusal

to supply information to a creature of Congress, though here to a Committee of one House rather than an administrative agency created by both Houses. The statute involved in the *Murdock* case gave the sole penal remedy to vindicate the information-gathering power of the tax authorities. Congressional committees, however, may rely on remedies in addition to the contempt statute. *Jurney v. MacCracken, supra.*

There is, thus, even more convincing reason for giving a narrow construction to "willfully" in the contempt statute than was the case in the statute considered in the *Murdock* case.

In both the *Murdock* decision (at 394) and *Screws v. United States*, 325 U. S. 91, 101, the Court stated that "when used in a criminal statute ['willfully'] generally means an act done with a bad purpose." Since there are no peculiar circumstances in legislative history or otherwise to the contrary, the general meaning obviously must be applied to the statute here involved.

In the *Murdock* opinion, also, the Court clearly indicated that such was the construction to be given to the very statutory clause here involved. It pointed out (at 397) that in the contempt statute, "Two distinct offenses are described in the disjunctive, and in only one of them is willfulness an element." For this reason it approved *Sinclair v. United States, supra*, in not applying to the second offense, the one in which willfulness is not mentioned, the test of a bad purpose or evil intent. It clearly thus considered that this test would apply to the first offense—which is the one for which petitioner was indicted and convicted.

In *Hartzel v. United States*, 322 U. S. 680, the Court construed "willfully," as used in the Espionage Act, to require an evil purpose. It emphasized the need for restrictive interpretation of a statute which, like the one here, involves questions of freedom of speech.

The assignment of a moral content to the term "willfully" affords the only method by which effect can be given to the legislative distinction made by requiring that the offense of a default be "willful" while making no such requirement as to the offense of refusal to answer questions.

It is well settled that statutory crimes, except for limited classes not here involved, are construed to require *scienter* as an element of the offense even where the statutory definition does not expressly include it. *United States v. Balint*, 258 U. S. 250, 251, 252; see dissenting opinion in *Screws v. United States*, 325 U. S. 91, 153. And it is elemental that to support conviction of any crime other than one involving negligence, the defendant's conduct must be intentional rather than inadvertent. The court below, therefore, gave no effect to the statute which it would not have had to give without the presence of "willfully", and this though the careful subsequent omission of the word stresses the legislative design to give special content to the word.

The construction we suggest is more in accord with the philosophy of the authors of the statute. The statute was drafted in 1857 [10] by a select House Committee composed of lawyers who had been in active practice.[11] The lawyers and jurists of that day were followers of Blackstone, and they shared the master's moralistic, natural law approach to crime. Blackstone considered that every crime requires a "vicious will." 4 Comm. *21. The great contemporary commentator on criminal law was Bishop, who wrote in 1856: "'Willful,' or 'Willfully,' sometimes mean little more than intentionally, designedly. Yet it is more frequently understood to extend a little further, and approximate the idea of

[10] 11 Stat. 157 (1857). For appointment of the Committee which reported the bill see Cong. Globe, 34th Cong., 3d Sess., 277. For report of the bill see *id.* 404, and for substitution of language by the reporting committee, see *id.*, 427.

[11] See remarks of Representative Orr, chairman of the committee. *Id.*, 432.

the milder kind of legal malice; that is, as signifying an evil intent without justifiable excuse." [12]

In *Fields v. United States*, 164 F. (2d) 97, *cert. denied*, 332 U. S. 851, the court construed "willfully" in the statute as meaning merely "voluntarily" on the theory that this construction served the purported statutory objective to facilitate the gathering of pertinent information by an investigating committee. The legislators who introduced and supported the statute had in mind, however, a much more limited purpose. They wished only to increase the sanction against recalcitrant witnesses. They felt that, as a matter of law, witnesses who refused to appear or answer could not be incarcerated for contempt beyond the session of the House which proceeded against them. They pointed out that this sanction was an ineffectual compulsion if the session was near its end. It was to this problem that the legislation was addressed, and its authors consciously limited its scope; they knew that direct proceedings by the House were still available, and relied on those as their primary sanction. Cong. Globe, 34th Cong., 3d Sess., 405, 406 (remarks of Representative Orr).

It thus appears that the legislation did not have the remedial objectives ascribed to it by the *Fields* decision. Instead, its purpose was to cumulate penalties. The statute, therefore, should be construed strictly.

VII. A Refusal to Be Sworn Is Not a Default Under the Statute.

The "default" for which petitioner was indicted was a refusal to be sworn, and this is the utmost that the proof shows. A refusal to be sworn is not, however, a "default" within a proper construction of the statute.

"Default," of course, refers to a breach of duty (Black's Law Dict. (3d ed. 1933) 539), and we must look to the

[12] The quotation may be found in 1 Bishop, *Criminal Law* (9th ed.) sec. 428. Bishop first published his first volume in 1856.

context to determine the duty involved. Here the duty is indicated in the text by the words "summoned" and "who, having appeared," and refers to a failure to appear. This comports with lawyers' jargon, in which "default" refers to a failure or omission to plead or appear. *Ibid.* 3 Coke on Littleton, c. 7, sec. 438. *Cf.* 3 Bl. Comm. *396. Such was the meaning assigned to "default" by decisions contemporary with the legislation. *Page v. Sutton, Orlopp & Co.*, 29 Ark. 304, 306 (1874); *Covart v. Haskins*, 39 Kan. 571, 574, 18 Pac. 522 (1888). So too the contemporary lexicon. 3 Oxford Eng. Dict. (1933) 126, quoting the 1828 Webster.

Although, as held in *Townsend v. United States*, 68 App. D. C. 223, 227, 228, 95 F. (2d) 352, 356, 357, cert. denied, 303 U. S. 664, the duty to appear comprehends the duty to attend, there is no authority of any kind, case or lexicon, which includes in a duty to appear an obligation to take an oath. In view of the settled necessity of giving a strict construction to a penal statute, the statute cannot be extended to embrace the latter obligation.

A limited construction is likewise appropriate in view of the availability of alternative proceedings. Either House of Congress may cite or punish for a contempt directly whether or not the conduct is subject to the statutory remedy, and the direct sanction has been frequently employed. *Jurney v. MacCracken*, 294 U. S. 125; *Barry v. United States ex rel. Cunningham*, 279 U. S. 597; *McGrain v. Daugherty*, 273 U. S. 135.

The statutory logic is to the same effect. As shown by the requirement of wilfulness in the case of one of the crimes covered by the statute and not in the other, Congress felt the need of a greater showing to punish a person whose conduct had not been observed (one who defaulted appearance) than to punish one who committed contempt in the committee's very presence. Since a refusal to be sworn takes place only at a hearing, it cannot be a type of conduct regarded as a "default." Whether or not it is a refusal to

answer questions is not material here, since the indictment did not allege that offense.

No statute *requires* a witness before a Congressional committee to take an oath. And the swearing-in of witnesses before such committees is not a universal practice. The Committee on Un-American Activities and its predecessor committees have themselves frequently accepted unsworn testimony.[13] If the indictment, as worded, states an offense, then one who for conscientious scruples insisted on affirming rather than swearing could likewise be indicted and convicted, since the indictment does not negative a willingness to affirm. Aside from the constitutional question raised by such a result, the statute should clearly not be so construed.

VIII. The Petitioner Was Not Required to Testify Before the Committee Because He Was Interned as an Enemy Alien and Was Also an Alien in Transit.

The petitioner cannot be punished for a default because he was under no duty to testify before the Committee.

A. Petitioner's immunity as an interned enemy alien.

It was stipulated that the defendant had been arrested and held in custody as an enemy alien at the time he appeared before the Committee (R. 80, 81).

An interned enemy alien is entitled to all the rights of a prisoner of war. *Basic Field Manual, FM 27-10, Rules of Land Warfare*, 16; *Law of Land Warfare prepared at*

[13] See, e. g., Hearings before Committee on Un-American Activities, vol. 2, pp. 1359-1360 (receipt of unsworn statements of Steve Gadler; 75th Cong., 3d Sess., 1938); vol. 4, pp. 2830-2837, 2999-3004, 3064-3065 (receipt of unsworn statements of Rev. Howard Stone, Mrs. Henry M. Roberts, Jr., John H. Cowles; 75th Cong., 3d Sess., 1938); vol. 7, pp. 4810-4830 (receipt of unsworn testimony of William E. Browder; 76th Cong., 1st Sess., 1939); vol. 10, pp. 6455-6456 (receipt of unsworn testimony of Charles S. Cox; 76th Cong., 1st Sess., 1939); vol. 12, pp. 7521-7525, 7525-7534, 7538-7553, 7555-7589 (receipt of unsworn testimony of Samuel Dickstein, Charles Kramer, Dorothy Waring, Thomas F. P. O'Dea; 76th Cong., 3d Sess., 1940).

Judge Advocate General's School at p. 47; United States Department of State Bulletin, vol. VI, No. 152, p. 445, 446, May 23, 1942; 3 Hyde, *International Law 1862;* 2 Oppenheim, *International Law (6th Edition, Lauterpacht)* §127, pp. 299-300; Flory, *Prisoners of War*, 24-27; Wilson, *Treatment of Civilian Alien Enemies*, 37 American Journal of International Law 30 (1943); *United States War Department Mobilization Regulations*, No. 1-11 (1 April 1940) p. 3; *Rex v. Commandant of Knockaloe Camp (Ex parte Forman)*, 117 Law Times Reports 627 (1917); *King v. Supt. of Vine St. Police Station*, 1 KB 268 (1916).

Furthermore, since the trial court prevented the defense from making an offer of proof on the subject (R. 109,110), it must be accepted for the purposes of this record that the Alien Enemy Control Unit of the Justice Department, which had supervision and control over enemy aliens arrested under Presidential warrants (R. 108), accorded to persons in custody as enemy aliens the rights guaranteed to prisoners of war by the Geneva Convention.

As one having the status of a prisoner of war, the petitioner could not be required to testify as to anything other than his "name, rank or regimental number," none of which was of consequence to the Committee. *Geneva Convention on Prisoners of War*, Article 5, 47 Stat. 2030; *Law of Land Warfare*, at p. 58; *Spaight, "Air Power and War Rights"* 340; 2 Oppenheim, *op cit.* §126 a., p. 294. We submit that the statute should not be applied to violate a treaty and accepted principles of international law.

B. Petitioner's immunity as an alien in transit detained in this country against his will.

The trial court excluded evidence offered to show that the petitioner's status in this country was that of an alien in transit, that his presence in the United States was involuntary, and that despite his repeated efforts to obtain permission to leave the country, he was detained here by

government authorities against his will (R. 95-98, 115, 116, 62, 63).

The authority of the House Un-American Activities Committee to investigate can constitutionally extend only so far as its inquiries are in aid of the formulation of valid legislation. *Kilbourn v. Thompson, supra; McGrain v. Daugherty, supra; In re Chapman, supra; Jurney v. McCracken, supra.* In view of the nature of the jurisdiction assigned to the Committee, no other power of Congress or of either House (as, for example, a House's power to determine the qualifications of its members) can possibly justify the Committee's inquiries.

To require the petitioner to assist Congress to formulate legislation would be in violation of international law. Each person owes primary allegiance to the state of which he is a citizen or subject. When present in a foreign country, he is, as stated by Justice Field, "bound to obey all the laws of the country, *not immediately relating to citizenship*, during . . . sojourn in it." Though his "absolute and permanent allegiance" is to his own sovereign, he owes to the country of residence "a local and temporary allegiance." *Carlisle v. United States*, 16 Wall. 147, 154 (emphasis added); *The Schooner Exchange v. M'Faddon*, 7 Cranch 116, 144; *United States v. Wong Kim Ark*, 169 U. S. 649, 693.

The numerous cases holding aliens subject to domestic laws involve application of the police or regulatory power. The duty to assist the formulation of legislation, however, is clearly a requirement of *allegiance*, not of the police power. It is thus distinguishable from a duty to testify in court as a witness, say, to a crime committed in the country of residence. It is an obligation which "immediately relates to citizenship", to use Justice Field's phrase.

It may be that an alien domiciled in this country has a sufficient nexus with our government so that he, within his "local and temporary allegiance," owes assistance to the

legislative process. But to impose such an obligation on a transient alien, particularly one whose stay has been compelled by the very government seeking to impose the duty, seems clearly a requirement of allegiance which cannot be justified under the law of nations.

A clear analogy exists in the obligation, which arises from *allegiance*, to protect the state by taking up arms in case of war. The duty of assisting the government to formulate legislation is comparable to the duty of protecting the government from enemy action.

It is an accepted rule of international law that aliens do not owe to the state in which they reside the duty of bearing arms in its defense. Aliens are not, therefore, subject to compulsory military service without violation of international law. 4 Moore, *International Law Digest* (1906) sec. 548, collecting precedents; 3 Hackworth, *Digest of International Law* (1942) sec. 281. This nation has recognized this principle as regards aliens resident within its boundaries. It has insisted that foreign nations recognize it as regards American citizens resident abroad, as in 1804 when the State Department vehemently protested British impressment of American citizens in Great Britain. 4 Moore, *International Law Digest* (1906) 52.

Congress has infringed on this principle in minor respects in the selective service acts occasioned by World Wars I and II, by subjecting to the draft alien residents who have declared their intention to become American citizens. Even this infringement, limited as it was to residents, not transients, and to those who had already taken steps to change their allegiance, aroused vehement protests from sister states and caused our Executive embarrassment. See 3 Hackworth, *op. cit.* 602 ff.

Suppose an American citizen en route to France touched at an English port, or visited in England temporarily. Surely the House of Commons could not, without violating

international law, compel him to testify in order to assist Parliament to determine British foreign or domestic policy. Still less could it compel him to testify regarding actions and policies of the United States government. We can imagine the indignation which such a procedure would inspire in this country, and the representations which would be made by our State Department of violations of international law. Or can we suppose that on Winston Churchill's recent visit to this country, he could have been compelled to testify before a Congressional committee to assist the formulation of federal legislation? And would not such an attempted inquisition of Mr. Churchill have seemed particularly outrageous if it dealt with the actions and policies of foreign governments, perhaps even including his own?

Doubtful as the case may be with respect to aliens who have taken up residence in this country of their own accord, it seems incredible that the Committee can exact testimony to aid legislative formulation from an alien in transit through this country or on a temporary visit. Still less can the Committee exact such testimony from an alien who has been detained in this country against his will and who was produced to the Committee as a prisoner.

We are not to suppose that Congress meant to violate the law of nations except upon the clearest showing of such a legislative intent. No such intent appears in the definition of the Committee's jurisdiction, and it follows, therefore, that the Committee had no power to compel the petitioner's testimony. This being the case, the petitioner did not violate the statute, since it is only as broad as the power of inquiry it protects. *In re Chapman, supra; Sinclair v. United States, supra.*

The majority below chose to ignore this question, and instead discussed the easier question of the authority of the Committee over a resident alien (R. 238, 170 F. (2d) at 279), an issue not presented by the facts and not argued or briefed below.

CONCLUSION

The petitioner is a European anti-Fascist, a Communist, who in his vicissitudes as a political refugee from Hitlerism was detained in this country by accident and against his will. The House Committee on un-American Activities, in its campaign to censor political opinion and expression, procured his unlawful arrest and imprisonment, with the cooperation of the Attorney General. When he was brought in humiliating custody before the Committee, he sought three minutes to express objections to what he considered "unlawful proceedings of this Committee against my person" (R. 133). He was denied that opportunity. Thereupon he was, at the Committee's recommendation, cited for contempt by the House, following a debate which candidly revealed that the purpose of the proposed prosecution was not to vindicate the House's privileges, but instead to give the Department of Justice time to try to dig up a criminal case against him and to prevent his return to Europe (see footnote 5, *supra*). The debate revealed the intention of the Committee to "serve notice" on others who held opinions condemned by it that they would run like risks of persecution. 93 C. R. 1187 (1947); see footnote 5, *supra*. He was then denied his day in court by being subjected to an unfair trial.

Obviously, the petitioner's real "offense" is that he is a Communist, and the trial below stands for the proposition that a Communist is not entitled to a fair trial before being imprisoned. This is apparently the view of the House Committee on Un-American Activities and the Attorney General.[14]

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[14] Compare the following colloquy when the Atorney General appeared before the subcommittee on legislation of the Committee. Hearings before the Subcommittee on Legislation of the Committee on Un-American Activities, 80th Cong., 2d sess., on H. R. 4422 and H. R. 4581, February 5, 1948, p. 31 (emphasis added):

MR. VAIL: * * *

Mr. Clark, how would you feel about legislation preventing convicted aliens from being released on bail bond pending appeal of their convictions?

The issue here is not merely whether Gerhart Eisler should go to jail for one year, but whether our traditions of due process of law and equal protection to all will be vindicated before the world. The words of the petitioner, spoken at sentencing, apply (R. 211):

> To sentence in the United States a European anti-Fascist; who has fought his whole life against German militarism and imperialism, because he asked for three minutes to raise his objections against the abuse of power would unavoidably weaken the confidence of many millions of non-Americans in American justice and the American way of life. Such a sentence could not but lower the prestige of the United States in the eyes of the innumerable progressive-minded and freedom-loving peoples in the world. I ask you, therefore, to prove, by not sentencing me, that justice can be found in the United States for a European anti-Fascist despite the mad hysteria organized by the Un-American Activities Committee.

MR. CLARK: Convicted aliens?
MR. VAIL: I am thinking, for example of the *Eisler* case.
MR. CLARK: I see. The alien that has been convicted?
MR. VAIL: Yes.
MR. CLARK: Should not be released on bail—well, sir, I think that that would go a little far. I think it depends upon the individual. You take Eisler, for example. I ordered him picked up the other day. What I pointed out in my statement here was that we have this problem of aliens that we have ordered deported that continued to carry on the same type of activities that we based the deportation upon, but we are unable to keep them in custody because the courts have held that we can't do that except during the period when we try to get the papers.

So the other day I ordered Mr. Eisler picked up for deportation because he had been making speeches over the country that were derogatory to our form of government and our way of life, and we had a case down here against him also, but I think that a blanket provision that would not permit bail would go mighty far in that direction. I think you largely have to leave it up to the courts.

MR. VAIL: I don't think *we* went too far in the *Eisler* case or that it would go too far in a case similar to the *Eisler* case.

MR. CLARK: That is a case in the courts, and I would rather not discuss it, sir.

MR. VAIL: Well, you are certainly to be complimented for the action taken in that case because I happen to know something about the activities of Eisler during the period he was out on bail bond, and it seems to me there should be something done to curb that.

MR. CLARK: I shall always and the Department of Justice shall always bear in mind foremost the civil rights of the people, whether they be citizens or not, *but we shall also bear in mind that the 140,000,000 Americans are entitled to protection from those who try to force upon them a foreign ideology.*

So too apply the words of this Court in *Chambers v. Florida*, 309 U. S. 227, 241: "No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution — of whatever race, creed or persuasion."

We ask this Court to extend to this alien Communist the rights under our Constitution and judicial system which have until now been denied him. We submit that the Court should reverse the judgment below and direct that the indictment be dismissed.

Respectfully submitted,

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APPENDIX

Statutes Involved

(a) Rev. Stats. § 102, as amended by c. 594, Act of June 22, 1938, 52 Stat. 942, U. S. C. Title 2, § 192:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

(b) Act of March 3, 1911, c. 231, § 21, 36 Stat. 1090 (formerly sec. 21 of Judicial Code, U. S. C. Title 28, § 25):*

> Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in section 24 of this title, or chosen in the manner prescribed in section 27 of this title, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a

* Now, with minor revision, 28 U. S. C. § 144.

certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action.

(c) Sec. 121 (b), Legislative Reorganization Act of 1946, P. L. 601, c. 753, 79th Cong., 2d Sess., 60 Stat. 828, amends Rule XI (1)(q)(2) of the Rules of the House of Representatives to provide:

> The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.
>
> The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.
>
> For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.

(d) Article 5, Geneva Convention on Prisoners of War, 47 Stat. 2030 (1929).

> Every prisoner of war is bound to give, if he is questioned on the subject, his true name and rank, or else his regimental number.

If he infringes this rule, he is liable to have the advantages given to prisoners of his rank curtailed.

No coercion may be used on prisoners to secure information relative to the condition of their army or country. Prisoners who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind whatever.

If, because of his physical or mental condition, a prisoner is unable to identify himself, he shall be turned over to the medical corps.